Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1979

NO. 79-2035

MELBA TILL ALLEN, Petitioner

v.

STATE OF ALABAMA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE
ALABAMA COURT OF CRIMINAL APPEALS

RICHARD D. HORNE
301 St. Joseph Street
P. O. Box 1706
Mobile, Alabama 36601
1-205-432-4546
Counsel for Petitioner

May 5, 1980

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The Petitioner Melba Till Allen respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Alabama Court of Criminal Appeals entered in this proceeding on November 20, 1979.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals, not yet reported, appears in the Appendix hereto as Exhibit 1. No opinion was rendered by the Alabama Supreme Court in denying certiorari.

JURISDICTION

The judgment of the Alabama Court of

Criminal Appeals was entered on November 20, 1979. A timely application for rehearing before that Court was denied on December 20, 1979 and a timely petition for a writ of certiorari was filed with the Alabama Supreme Court. That petition was denied on February 8, 1980 and this petition for certiorari was within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC 1257 (3).

QUESTIONS PRESENTED

1. Whether petitioner's right to due process under the 5th and 14th Amendments was violated by the cumulative acts of the Alabama Ethics Commission and acts of the Montgomery County District Attorney. Petitioner asserts that the investigation of petitioner during the fall of 1977 and her subsequent indictment and trial were without the requisite procedural safeguards so that her conviction is unconstitutional. Petitioner further asserts that §36-25-1, Code of Alabama (1975) (hereinafter Ethics Law) is unconstitutional as written and applied.

2. Whether the conduct of the District Attorney of Montgomery County amount-

ed to prosecutorial misconduct so as to violate petitioner's right to due process under the 5th and 14th Amendments of the United States Constitution, and did it operate to deny petitioner effective counsel in violation of the 6th Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

A. Code of Ethics for Public Officials, Employees, Etc., §36-25-1, Code of Alabama (1975 Act 130 of the Alabama Legislature [1975]):

> The full text of the Act is set out in the Appendix hereto as Exhibit 2.

B. 5th Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness a-
against himself, nor be deprived
of life, liberty, or property,
without due process of law; nor
shall private property be taken
for public use, without just
compensation.

C. 14th Amendment to the Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D. 6th Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to

> a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

During the summer and fall of 1977, there began a series of events which captured the interest of the entire state. Prompted by an anonymous letter, the Alabama State Ethics Commission began an investigation of State Treasurer Mrs. Melba Till Allen which drove a then rollicking political campaign to Section B of the state's newspapers.

This investigation culminated in a press conference of December 1, 1977, at which time those allegations of the com-

mission report not already disclosed became "public".

Despite the fact that the Commission had used the Montgomery County Grand Jury's subpoena power to compel certain banks to turn over their records, Mr. Jimmy Evans, District Attorney for Montgomery County, had a subpoena served on the Commission some twenty minutes after the report was issued.

At that point, the District Attorney took over and the Grand Jury proceedings, with the publicity rivaling that of the Ethics Commission, returned the five indictments of which the instant case is but one.

Following arraignment special pleas were filed, which, among several, listed as grounds the vagueness, overbreath, and unconstitutionality of Act 130 of the Legislature (1975). Said pleas were denied.

The five indictments charged were:

(1) CC-78-319 - Use or benefit of a private plane belonging to Ed Gregory in return for depositing state funds in banks in which he had an interest.

(2) CC-78-320 - Two counts charging placing state funds in the American National Bank of Geneva, Alabama, in return for personal loans or benefit.

(3) CC-78-321 - Placing of state funds in banks in which Mr. Frank Merrifield had an interest in return for a personal loan or benefit from Mr. Merrifield or his banks.

(4) CC-78-322 - Receiving a sum of money or other value for placing state funds in the American National Bank of Geneva, Alabama.

(5) CC-78-402 - Failure to disclose financial interests as mandated by the Ethics Law.

The trial judge made it clear on several occasions that the cases were to be taken in their chronological order. When the State of Alabama moved for a continuance due to the alleged unavailability of a witness the Judge found the witness was available. This was based upon the witness having called his doctor the day after he received his subpoena and having scheduled surgery two days before trial.

On Monday, May 22, 1978, some four days after the State of Alabama had moved for a continuance due to the alleged absence of a witness they were back in court asking for another continuance. On or about Friday, May 19, 1978, Honorable Jimmy Evans took the case of E. A. Gregory before the Grand Jury and indicted him on an Ethics Law violation. This would seem to be insignificant except for the fact that Mr. E. A. Gregory was to be the prime state witness in Case CC-78-319 which had been scheduled for trial on May 22, 1978, the very same day this information was first made known to the court.

Mr. Gregory, through his counsel, made known to the court that he was willing, ready and able to testify. The District Attorney moved to nolle prosse with leave to return. The court continued the case generally, the petitioner moved for a mistrial, reminding the court of its prior rulings about expeditious treatment of the trial calendar. The petitioner objected to Case CC-78-320 being moved up when petitioner was prepared to try Case CC-78-319.

The petitioner then moved for the judge to recuse himself on the basis of granting of the continuance and the immediate resetting of Case CC-78-320. This was on the basis of violation of petitioner's Sixth Amendment right to counsel. The motion was denied and petitioner moved for a mistrial.

Petitioner was put to trial on Case CC-78-320 with two hours notice and the jury returned a conviction on May 24, 1978.

On September 1, 1978, a hearing was held on a Motion for A New Trial based upon evidence discovered pursuant to petitioner's Motion for Discovery on Cases CC-78-320 and CC-78-402.

Upon hearing, petitioner presented testimony of Alto V. Lee who was Chairman of the State Ethics Commission during the investigation of Mrs. Allen.

His testimony revealed that the Ethics Law (Act 130, 1975 Legislature) was an amendment of Act 1056 passed in 1973. Testimony revealed that §16(q) of the original Act (1973) contained the following language:

> "The Commission shall prepare and publish, prior to the im-

plementation of this act, procedures for review or appeal of any action taken against or in regard to any person covered in this act."

Such language was contained in §15(c) of the 1975 Act as well. However, on August 30, 1974, the Commission adopted Regulation 19 and mandated by §16(g) of the 1973 Act. Such was not the case with the 1975 Act, for the testimony revealed that no implementation of §15(c) of the 1975 Act was made until February 3, 1978, when the Commission adopted Regulation 19 of the 1973 Act. From the date of passage of the 1975 Act until the February 3, 1978 meeting there was no procedure for review of complaint. This would include that period (September 19, 1977 through December 1, 1977) when the Commission investigated Mrs. Allen.

At the close of the hearing the Motion for A New Trial was denied as to all grounds.

A hearing on the Motion for Rehearing of the denial of Motion for New Trial was held on October 31, 1978. There testimony was presented from Mr. Melvin G. Cooper of the State Ethics Commission.

Mr. Cooper testified that neither he nor any member of the Commission delivered any material received by the Commission to Mrs. Allen. He further testified that there was never any hearing, formal or informal, under any Regulation 19 for Mrs. Allen. The motion was denied.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with other decisions of this Court with regard to what constitutes due process under the 5th and 14th Amendments to the Constitution of the United States in that §36-25-1, Code of Alabama (1975) is unconstitutional as written and as applied.

In both the Demurrer and Motion To Dismiss filed prior to trial, the petitioner asserted that the statute under which she was being prosecuted was unconstitutional. Those pleas properly put before the Court the question of unconstitutionality. Certain evidence was presented on the question which will be addressed in other argument.

However, on petitioner's Motion for a New Trial, other grounds were raised which showed the statute was unconstitu-

tional in that it was never properly implemented. While a motion for a new trial may not have been the proper characterization for this motion the Court may disregard the caption and consider the substance of the motion. (See §15-5-3, Code of Alabama, 1975):

> "In criminal proceedings, a plea is to be determined according to its substance and not by its commencement or conclusion."

The testimony of Mr. Alto V. Lee revealed that the 1975 Ethics Law was an amended version of the 1973 Act. The 1973 Act mandated that due process procedures be implemented and on August 30, 1974 they were. This became Regulation 19. The 1975 Act contained the same mandate in §15(c). However, no action was taken by the Commission to implement §15(c) of the 1975 Act until February 3, 1978 when the Commission adopted Regulation 19 of the 1973 Act.

The question before this Court is whether Mrs. Allen could be prosecuted under this statute when a condition precendent to its implementation had never taken place?

Neither Regulation 19 of the old Act nor any similar regulation was implemented in the 1975 version until February of 1978, some three months after the Ethics Commission concluded its investiation. This is in spite of the mandate of §36-25-5(14):

> "In all matters that come before the Commission concerning a complaint on an individual, the laws of due process shall be strictly adhered to."

The Court of Criminal Appeals' decision is in conflict with Vitarelli v. Scaton, 359 U.S. 535 (1959) where this Court found that where an administrative agency failed to follow its own rules and regulations the dismissal of an employee was illegal. See also, Service v. Dulles, 354 U.S. 363 (1957).

This lack of any procedure may well account for the cavalier way the investigation was conducted.

Mr. Cooper, as Executive Director of the Commission, testified in post trial hearings that there was never any hearing involving Mrs. Allen, either formal or informal. Nor did she ever receive any ma-

terial from the Commission about the charges against her. This evidence certainly flies in the face of any claim by the Commission that they afforded her the requisite due process.

By the Demurrer and Motion to Dismiss the petitioner questioned the constitutionality of the statute under which she was tried. While the hearing styled Motion For A New Trial or Motion For A Rehearing may have been more properly characterized as a Motion In Arrest Of Judgment or Writ of Error the Court has authority to disregard the caption and proceed on the merits, §15-5-3, Code of Alabama, 1975 (supra).

There can be no question but that Mrs. Allen had fundamental liberty and property rights at stake in their investigation. Her job and freedom were both in jeopardy. As proof, she is now without a job and on appeal from a three year sentence in the penitentiary.

Due Process has been defined as requiring:

> "That deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity

for hearing appropriate to the nature of the case."

Boddie v. Connecticut, 401 U.S. 371 (1971)

Put another way:

"Both liberty and property are specifically protected by 14th Amendment against any state deprivation which does not meet standards of due process, and such protection is not to be avoided by a simple label that a state chooses to fasten upon its conduct or its statute."

Giaccio v. State of Pennsylvania, 382 U.S. 399 (1966)

In the instant case there were no procedures as evidenced by the Commission's bootstrap action of February 3, 1978. Therefore, whatever vague notions may have controlled the investigation, they existed only in the mind of the Commission.

The decision below failed to address the question of the lack of due process during the Ethics Commission hearing. The only reference to this argument is found at p. 25:

"Affording the appellant

> in the present case a hearing before the Commission would not have prevented the District Attorney or the Attorney General of Alabama from prosecuting a violation of this act."

Can this Court or anyone perceive that the petitioner was afforded due process when she was never given a hearing, she never could confront her accusers, nor could she view the evidence against her for it was subpoenaed just twenty minutes after the Ethics Commission awarded its decision.

This fundamental deprivation taints their entire proceeding and gives this Court ample grounds for granting this writ.

2. The decision of the Alabama Court of Criminal Appeals is in conflict with decisions of this Court with regard to prosecutorial misconduct and the right to effective counsel.

The petitioner was arraigned on March 30, 1978. Upon the hearing of several motions the Court repeatedly advised counsel that the cases would be tried in chronological order in which they came

from the Grand Jury (CC-78-319, CC-78-320, CC-78-322, CC-78-323 and CC-78-402). The Court set the cases in sequence to be tried on consecutive weeks, May 22, May 29, etc.

On May 16, 1978, the District Attorney filed a motion for a continuance of CC-78-319 based on the fact that the petitioner had filed a petition for a writ of mandamus with the Alabama Court of Criminal Appeals. The Court noted the application had been denied and denied the District Attorney's motion for a continuance. Failing in that, the District Attorney moved for a continuance based upon the unavailability of a witness.

The trial court, sua sponte, made an investigation and found that the witness had scheduled elective surgery the day after he received his subpoena. The operation was to be two days before trial. The Judge found the witness to be available and denied the motion for a continuance.

Two days later, on May 19, 1978, the same District Attorney convened the Grand Jury of Montgomery County and indicted Ed Gregory. This would seem in-

significant except for the fact that Ed Gregory was to be the state's prime witness in CC-78-319, the case he had twice tried to have continued.

On Monday, May 22, 1978, the District Attorney moved again to continue CC-78-319 based upon the fact the state's witness would be hostile (surprise) having been indicted the previous Friday. This was in spite of the fact that Ed Gregory was in Court and willing to testify freely without immunity. The Judge granted the motion and continued CC-78-319 generally and set CC-78-320 for trial immediately. Thereupon, a jury was struck and trial commenced.

Both CC-78-319 and the indictment against Ed Gregory were subsequently dismissed.

Petitioner raised vehement objection to the continuance on the grounds of insufficient time to prepare and the sham used by the District Attorney to accomplish the continuance. The objections were overruled.

The Alabama Court of Criminal Appeals ruled that the failure to grant a continuance was not an abuse of discretion.

They further ruled that his acts in conjunction with the grand jury:

> "..we find no actions by the prosecutor which would constitute misconduct. All of his actions were in accord with the law and his duty as a District Attorney."
>
> (Appendix A, p. 28)

Petitioner asks this Court to look beneath the gloss of the District Attorney's actions. The District Attorney convenes the Grand Jury. It is entirely within his discretion who to call (and who not to call), when to call them, etc.

Petitioner asserts the District Attorney's actions were an intentional manipulation of the judicial system to accomplish what he could not do through proper channels.

Federal cases have a dual thrust, first, the Court must look to see whether prejudice inured to the defendant because of the alleged misconduct, secondly, and of equal importance, is the exemplary affect of the prosecution participating in misbehavior.

Justice Brandes, in Olmstead v. U. S., 277 U.S. 438, 48 S.Ct. 564, 72 L. Ed. 944 (1928) stated the proposition that

prosecutorial misconduct was not a question of fairness alone but a recognition designed to:

> "maintain respect for the law; ... to promote confidence in the administration of justice; ...to preserve the judicial system from contamination... Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."

The Alabama cases are legion that continuances are discretionary with the Court and will not be overturned except for clear abuse; 6A Ala. D-11 Key No. 586; Davis v. Alabama, 545 F.2d 460 (1977); Fletcher v. State, 277 So.2d 882, 291 Ala. 67 (1973).

However, certain factors are to be weighed in assessing whether time to prepare is available.

1) likelihood of prejudice
2) degree of complexity
3) availability of discovery

4) the adequacy of defense actually provided at trial

5) the experience of counsel

6) representation by prior counsel which accrues to her benefit

U.S. v. Uptain, 531 F.2d 1281(1976)

Any objective measure of these factors weighs in favor of the petitioner. The case to be tried, CC-78-320, was materially different from the one it displaced, CC-78-319. It concerned different persons, a different geographical area and different proof.

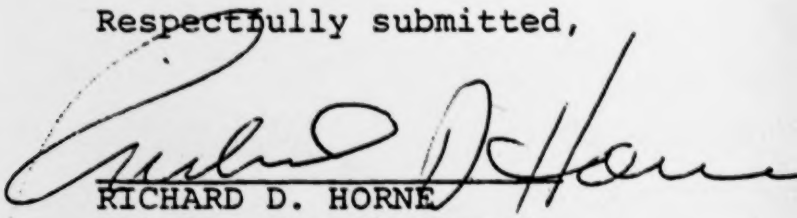
In the instant case the State of Alabama, through its prosecutor, the Honorable Jimmy Evans, violated both purposes espoused in Olmstead, supra. There can be no question but that petitioner was prejudiced by going to trial with little or no notice. Secondly, we have a situation where the State of Alabama is cast in the role of a law breaker by the prosecutor's obvious manipulation of the Grand Jury.

On either of those basis this Court is justified in granting this petition.

CONCLUSION

For these reasons, a writ of certorari should issue to review the judgment and opinion of the Alabama Court of Criminal Appeals.

Respectfully submitted,

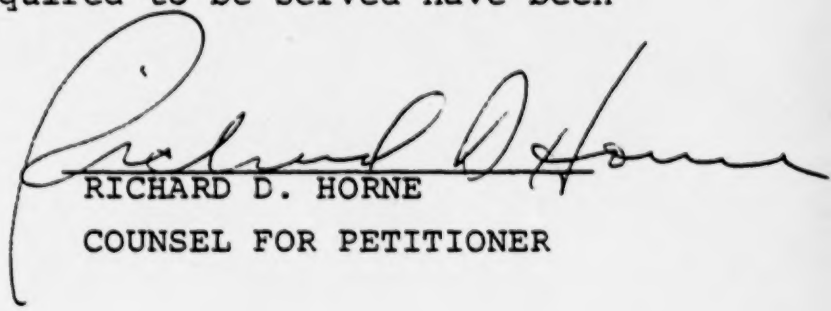


RICHARD D. HORNE
301 St. Joseph Street
P. O. Box 1706
Mobile, Alabama 36601
COUNSEL FOR PETITIONER

May 5, 1980

CERTIFICATE OF SERVICE

I hereby certify that I have on this ____ day of _____, 1980, mailed three copies of the Petition for Writ of Certiorari, postage prepaid, to counsel for the respondent and one copy to the Clerk of the Alabama Court of Criminal Appeals. I further certify that all parties required to be served have been served.



RICHARD D. HORNE
COUNSEL FOR PETITIONER

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1979-80

3. Div. 931

Melba Till Allen

v.

State

Appeal from Montgomery Circuit Court

DeCARLO, JUDGE

Melba Till Allen was indicted by the grand jury of Montgomery County on a two count indictment charging her with violation of Act No. 130 of the Alabama Legislature, Regular Session, 1975. The counts charge that she used her position as Alabama State Treasurer for personal gain by obtaining loans which benefited

her in exchange for placing State treasury funds in the American Bank of Geneva, Alabama.

She was arraigned in the presence of her attorneys and, subsequently, filed demurrers and a motion to dismiss. The demurrers and the motion to dismiss raised both the vague and ambiguous nature of the indictment and the unconstitutionality of the statute under which the indictment was brought. On the day of the trial, a motion for a change of venue based on the ground of pretrial publicity in Montgomery was filed and argued on behalf of the appellant. It was subsequently denied.

A jury trial was held, and the appellant was found guilty. She was sentenced to a term of two years in the penitentiary and notice of appeal was filed. Later, a motion for a new trial was argued and denied.

The indictment upon which this prosecution was based reads, in pertinent part, as follows:

"COUNT I

"The Grand Jury of Said County charge that, before the finding of this indictment,

"MELBA TILL ALLEN

"[W]hose name is to the Grand Jury otherwise unknown, a public official or employee, to-wit: Alabama State Treasurer, did unlawfully and feloniously use an official position or office, to-wit: the position or office of Alabama State Treasurer, to obtain direct personal gain for herself or her family or any business with which she or a member of her family was or is associated, by, to-wit: placing or agreeing to place or offering to place public or state funds or monies over which she had official access, custody and control, on deposit in or with, to-wit: the American Bank of Geneva, a state charatered banking institution, located in or near the city of Geneva, Alabama, to obtain from the said bank direct personal financial gain, to-wit: a loan and/or loans, or credit to the said MELBA TILL ALLEN or a business with which she or a member of her family was or is associated, which said use and gain is not specifically authorized by law, contrary to the provisions of Act 130, Regular Session of the Alabama Legislature, 1975, against the peace and dignity of the State of Alabama;

"COUNT II

"The Grand Jury of said County further charges that, before the finding of this indictment,

"MELBA TILL ALLEN

"[W]hose name is to the Grand Jury otherwise unknown, a public official or employee, to-wit: the Alabama State Treasurer, did unlawfully and feloniously use an official position or office, to-wit: the position or office of Alabama State Treasurer, to obtain direct personal gain for herself or her family or any business with which she or a member of her family was or is associated, by, to-wit: placing or agreeing to place or offering to place, or agreeing to offer to place public or state funds or monies over which she had official access, custody or control, on deposit in or with, to-wit: the American Bank of Geneva, a state chartered banking institution, located in or near the city of Geneva, Alabama, in order to receive, to-wit: a loan and/or loans, or credit, and/or to obtain direct personal financial gain for the said MELBA TILL ALLEN or her family or a business with which she or a member of her family was or is associated, which said use and gain is not specifically authorized by law, contrary to the provisions of Act 130, Regular Session of the Alabama Legislature, 1975. . . ."

In support of this indictment the State presented the following evidence.

Frances Merriwether Bolden was the State's first witness. Before any

testimony was taken, a stipulation, which included documents from the Secretary of State showing that the appellant was Treasurer of the State of Alabama, was entered into by the defense counsel and the State. The stipulation also recited that the appellant was the State Treasurer of Alabama from the time she was elected and was at the time of the trial the State Treasurer of Alabama.

Wiley O. Weaver was employed by the State of Alabama in the State Auditor's Office. He testified from "bank record reconciliations" that as of June 1977 the State Treasurer of Alabama controlled $438,100,870.62. Of that amount, $169,380,000 were time deposits and $268,720,000 were demand deposits. Weaver explained that demand deposits do not draw interest and are used to pay current bills owed by the State. Further, he stated that time deposits draw interest in whatever banks they are placed.

Francis Merrifield was a farmer from DeFuniak Springs, Florida. He testified that he had various business interests in Alabama, the main one being a grain elevator located in Geneva, "Consolidare

Enterprises" which included insurance companies.

He admitted that he knew the appellant, Vance Dyar, Bonny Sutton, George Pihakis, Bill Ellis, and Louise Nolen. Merrifield recalled an occasion, on or about July 6 or 7th, 1977, when he met the appellant, Ellis, Dyar, Pihakis, Sutton and one other unidentified person at the Downtowner Motel in Montgomery, Alabama. The meeting occurred in the lobby and, at the time, the group discussed "Stars Over Alabama" and Consolidare Enterprises. Merrifield acknowledged that the appellant made some comments concerning "Stars Over Alabama." He said, "they had some bills that were passed due and they were needing some funding for a period." He stated that the amount mentioned by the appellant was "75,000 to $100,000."

Also, Merrifield acknowledged that there was a conversation concerning "Consolidare." He testified that the conversation involved "the fact that we needed a loan of 2.1 million dollars" and that the money was to be raised "through bank loans." According to Merrifield, the way to get the bank loans was to be "getting

bank loans with their assistance by placing State funds in said bank." Merrifield stated that Vance Dyar asked the appellant if "she saw any problems." According to Merrifield, the appellant resonded that "she didn't foresee any problems."

During cross-examination, Merrifield acknowledged that the appellant did not do anything for him to get the loan.

Merrifield recalled that at the Downtowner he had a conversation with Pihakis concerning the National Bank of Commerce. Merrifield stated, "I asked him to call Mr. Weil in Birmingham and see if we could get a loan through for $100,000 on my signature." Merrifield testified that the day after the conversation on July 6, 1977, he saw Vance Dyar at the DeFuniak Springs, Florida airport. At that time, Merrifield endorsed the note for $100,000. Merrifield said that he also received at that time a handwritten letter which he later destroyed. Merrifield recalled that, after seeing Dyar at the airport, he [Merrifield] received a telephone call from the appellantwho told him that the loan had been turned down in Birmingham.

Merrifield said that he was told by the appellant that "it wasn't on account of my financial statement, she told me it was for some other reason, she didn't get into it at great length." According to Merrifield, the appellant was under the impression that the loan had gone through. She told him that they had written checks in the amount of forty or fifty thousand dollars that were outstanding when the loan was turned down. Merrifield testified that he suggested to her that "they could probably get fifty thousand dollars at the American Bank in Geneva, Alabama to make her checks good." He said that the appellant "said she could put some State funds down there to help the situation."

During cross-examination, Merrifield acknowledged that the appellant did not have any interest in Consolidare Enterprises and that he owned the company along with George Pihakis, Ferd Weil and Farris Ritchey.

On further questioning, Merrifield acknowledged that the appellant had an interest in "Stars Over Alabama." In the telephone conversation he had had with

her, she told him that the checks bounced at the National Bank of Commerce and that she would give the American Bank of Geneva some deposits if a loan could be arranged there. Further, he acknowledged that he did not endorse appellant's fifty thousand-dollar note to the American Bank of Geneva and did not aid her in getting the money.

Merrifield continued to testify that, after the call to Mrs. Allen, he had a conversation with H. G. Hayes, President of the American Bank of Geneva. At that time, he told Mr. Hayes, "I was interested in getting a 2.1 and his bank wasn't big enough to handle it, but he used associated banks and we needed fifty thousand here to make her checks good up there that were outstanding." Further, Merrifield said, "it was understood there would be deposits."

During the trial, Merrifield was asked to examine State's Exhibit No. 4, which was a letter from Francis Merrifield to Mr. Charlie Martin of the National Bank of Commerce in Birmingham, Alabama. Merrifield testified that he had signed the letter and that it had been brought

to him by Dyar or Bonny Sutton. Referring to the letter, Merrifield stated, "it's guaranteeing that loan up there for that amount - a hundred thousand dollars." Merrifield identified the note which read:

> "Dear Mr. Martin: Please accept this letter as my acknowledgement that I have this date signed a blank note which I understand will be completed in the next few days in the principal amount of $100,000."

William D. Robertson, Jr. was a corporate pilot for Faith Investment Corporation of Pensacola, Florida. He explained that Faith Investment Corporation was a holding company owned by E. A. Gregory. After identifying a picture of the corporate aircraft, Robertson stated that, on July 7, 1977, he piloted the airplane from Pensacola to Talladega, Alabama and then to Montgomery. He testified that, when the plane left Pensacola, the passengers were Ed Gregory and Gerald Atkinson. Robertson stated that, after their departure from Talladega, they flew to Montgomery where Dyar and Sutton boarded the plane. They then flew to Pensacola where Gregory and Atkinson departed from the plane.

According to Robertson, he then flew

Dyar and Sutton to Defuniak Springs where they remained some sixteen minutes before returning to Montgomery.

Bonny Ray Sutton stated that he knew the appellant. He recalled that on July 7, 1977, he accompanied Dyar to the Downtowner Motel in Montgomery, Alabama. On that date, he saw Mrs. Allen and she, along with the two men was seated at a table with Merrifield, Ellis, and Pihakis. According to Sutton, they discussed "Stars Over Alabama, a theme park or amusement park or recreation area." Sutton acknowledged that the discussion concerning Stars Over Alabama and a loan to it was held in the appellant's presence. Dyar, Merrifield, and Pihakis were also present during the discussion. He recalled that the subject of a one-hundred thousand dollar loan for Mrs. Allen was discussed.

Also, he stated that "Consolidare" was discussed. He explained that Consolidare was a holding company formed by Pihakis, Merrifield, Ellis and some other people for the prupose of acquiring an insurance company in Florida. Sutton recalled that there was discussion relating to "Consolidare" and "Stars Over

Alabama." He explained "that was the whole purpose of being there. Mrs. Allen and Mr. Dyar were going to receive a $100,000 loan" from the National Bank of Commerce in Birmingham.

Sutton testified that the name of Ferd Weil was mentioned during the discussion at the Downtowner Motel. He explained that Ferd Weil was the vice president of the National Bank of Commerce and was also on the board of directors of Consolidare.

Sutton explained that, after meeting at the Downtowner, he accompanied Dyar to the Treasurer's office. They saw the appellant in her office where Dyar then received a check from the appellant in the amount of $200,000.

A copy of that check, payable to the National Bank of Commerce in Birmingham, Alabama, was introduced into evidence. According to Sutton, after the check was handed to Dyar, the two men left the Treasurer's office and drove to Birmingham with Pihakis. In Birmingham, they went to a restaurant where they met Weil. Later, Farris Ritchey arrived. Sutton said that they remained at the restaurant

for a couple of hours, then went to the Holiday Inn where they stayed for the night. He testified that the next morning they went to the National Bank of Commerce in Birmingham, where they saw Weil. Sutton stated that Dyar presented Weil with the two hundred thousand dollar check that he had received from the appellant. After a few minutes, Weil returned and handed Dyar a deposit slip indicating a deposit in the account of the State Treasurer, Melba Till Allen, for the amount of $200,000. Also, Weil gave Dyar a promissory note for a hundred thousand dollars and some signature cards. Dyar placed these in his pocket and, afterwards, they drove to the Montgomery Airport. In the waiting room at the Montgomery Airport, they met the appellant and Mrs. Nolen. Sutton stated that, at the airport, the appellant composed a letter which she signed and gave to Dyar. The appellant and Nolen each signed the note and the signature cards, which were also given to Dyar.

Afterwards, they met Gregory and his pilot outside. The appellant, Nolen, Dyar and Sutton were present when Gregory,

referring to Dyar, said "I don't know this fellow here, but Mrs. Allen is welcome to use my plane anytime she wants to."

After the conversation, he and Dyar, along with Gregory and the pilot boarded the airplane and flew to Pensacola, Florida, where Gergory deplaned. He stated that the flight was continued to DeFuniak Springs where, on landing, they saw Merrifield and his wife at the airport. According to Sutton, he saw Dyar give to Merrifield the promissory note, the handwritten letter from appellant, and the letter that was given to Dyar by Mr. Weil. Merrifield signed the note which he handed back to Dyar but kept the handwritten letter. Afterwards, they boarded the plane and flew to Montgomery where they drove by car to Point Aquarius. Sutton stated that the next morning he and Dyar drove to the National Bank of Commerce in Birmingham and handed to Weil the documents that had been signed by Merrifield.

Sutton was asked what he recalled about the letter which Mrs. Allen had written to Merrifield. Sutton testified,

"I recall the letter said that in the event that Mrs. Allen was to procure the 2.1 million-dollar loan for Mr. Merrifield, that the one-hundred-thousand dollar note at the National Bank of Commerce, which Mr. Merrifield was signing would be moved to another bank."

During the trial, Sutton identified State's Exhibit No. 8, a deposit slip in the amount of two-hundred thousand dollars to the National Bank of Commerce. Also, the evidence showed that the check of the State of Alabama Treasury Department was written to the order of the National Bank of Commerce on a "demand account."

Sutton then identified State's Exhibit No. 9, a letter dated August 11, 1977, signed by Melba Till Allen and notarized by Louise H. Nolen. Sutton read the letter to the jury. The letter which was from the appellant was directed to Selected Banks of Alabama. That letter read:

> "Gentlemen: This letter will introduce Mr. V. C. Dyar, who is assisting me in the formation and combining of various properties owned in part and in whole by me. Mr. Dyar will explain in detail the proposed plan of action I am seeking to develop. Any courtesies

> extended Mr. Dyar on my behalf, and any assistance you might render will be greatly appreciated. Very truly yours." [Emphasis added.]

Sutton also identified State's Exhibit No. 10, a check for $5,000, payable to cash, signed by the appellant and endorsed by Bonny R. Sutton. Sutton that check was given to him at Point Aquarius by the appellant for expenses.

During cross-examination, Sutton stated that he had been employed as a club manager at Point Aquarius Country Club, in Talladega County. He said that in July, 1977, he was fired. According to Sutton, he was told that Point Aquarius had been sold to Ed Gregory and that he "wasn't in tune with Mr. Gregory's method of operating."

Sutton denied that he had been discharged from the "Triple T Inns" for excessive drinking, althought he did admit that he was fired. Further, he denied that he had been terminated from the Point Aquarius position because he was not performing his job in a satisfactory manner.

On further cross-examination, Sutton was asked if he considered any of the letters carried by him from the State Treasurer to the bank to be a bribe. He answered "no, sir" but said "I thought that it would be an inducement." Also, he was asked if the appellant had received anything of value from any type of inducement he [Sutton] was involved in, and Sutton responded "yes, sir." Further, Sutton stated that he thought what she had received was a thing of value and said, "if a hundred thousand dollar loan is something of value, then I would have to say yes."

On further questioning, he admitted that the appellant had not received anything of value which she "didn't sign a note for." Also, when questioned whether he knew any people who could borrow money without making a note, Sutton responded, "I don't know of any that can borrow that kind of money with doing that." However, Sutton admitted that the appellant did not received the $100,000 loan.

During re-direct examination, Sutton recalled seeing Jim Case in Illinois and testified that Case had said to him

[Sutton] "do you have any papers that Mr. Dyar gave you, or did you get any papers from Mr. Dyar that has anything to do with Mrs. Allen?" Also, he said that the appellant had paid Case's "way up there."

Sutton identified State's Exhibit No. 11, a Certificate of Incorporation of SAND, Inc. Further, he explained that SAND was an "anagram" for Sutton, Allen, Nolen and Dyar. Sutton testified that the purpose of SAND was to purchase Point Aquarius Country Club and Resort. Also, he stated that he had seen all of the parties sign the documents of incorporation except Louise H. Nolen and that Mrs. Allen had signed on behalf of Nolen.

Sutton identified State's Exhibit No. 12, a check in the amount of $10,000, payable to the Life Insurance Company of America, signed by the appellant and drawn on the National Bank of Commerce in Birmingham, Alabama. He explained that the check was to be given to "secure an option to purchase Point Aquarius." Further, he stated that Point Aquarius was never purchased by SAND, Inc.

G. Scott Ray, President of Citizens Bank of Talladega, testified that in July,

1977, he knew Bonny Sutton. During that month, Ray cashed a check payable to cash drawn on the National Bank of Commerce and signed by the appellant. He stated that the amount of the check was $5,000 and that it was endorsed by Bonny Ray Sutton.

According to Ray, after the check was returned for insufficient funds, he called the appellant and told her what had happened. He stated that the appellant responded that "it should be good, there was supposed to have been some money transferred and I think perhaps I interrupted her and said, 'well, I'll re-run it, or I will re-run, or, maybe she said 'that's fine' and that was the gist of the conversation." Ray said that, when the check was later presented for payment, it was honored.

During cross-examination, Ray admitted that Citizens Bank of Talladega had approximately $496,000 in demand deposits from the State Treasurer's Office. Further, he stated that his bank was a "State depository" for a State liquor store account and that the total amount of State funds deposited in his bank

fluctuated depending on the sales of the State liquor store. Further, he acknowledged that a normal practice in the banking community was to call the Treasurer's office and ask for State funds when a bank desired them. Ray also acknowledged that the appellant had never asked for anything of value in return for her depositing State money in his bank.

H. G. Hayes was president of the American Bank of Geneva. He acknowledged that he knew the appellant, Dyar and Francis Merrifield. He testified that, during the summer of 1977, he had an occasion to call the State Treasurer. He explained that during the summer of 1977 a severe drought caused farmers in his area to lose about eighty or ninety percent of their corn crops. As a result, they were not able to repay their crop loans to the bank. He testified that he talked to the State Treasurer about getting some State deposits.

Sometime after talking with the State Treasurer, Hayes said he saw Francis Merrifield in July, 1977. On that occasion he gave Merrifield a promissory note and signature cards. Hayes stated

that Dyar was with Merrifield at the time. Dyar was told by Hayes that the document should be signed and returned to him along with a financial statement. Further, he said, "I told him not to forget we needed State deposits."

Hayes identified State's Exhibit No. 13, a promissory note for fifty thousand dollars dated August 10, 1977 and signed by Louise H. Nolen and Melba Till Allen. Hayes testified that the note was unsecured.

Also, Hayes identified State's Exhibit No. 15, a $500,000 check from the appellant as Treasurer of Alabama, which was payable to the American Bank of Geneva and which had been deposited as a time deposit. He identified the deposit slip dated August 25, 1977 for a $500,000 time deposit at the American Bank of Geneva. According to Hayes, he received the money from Dyar at the airport then later saw Dyar at the Downtowner Motel with Louise Nolen and the appellant. Hayes testified that after the meeting at the Downtowner, they went to the Sahara Restaurant in Montgomery, Alabama, where he had dinner with Dyar, Nolen and the

appellant.

While at the Sahara, Hayes told Allen that the bank needed State deposits and said "in fact we were expecting one that night and she did not have time to bring it." Further, according to Hayes, she did not have the deposit because of "an interview she had had with a news reporter, but that she would send it later, and I asked her for demand deposits rather than time if it was psosible." He testified that she explained that, because the legislature was watching closely any demand deposits, she could not place big deposits at any one time at the bank but would send it in small increments from time to time. Hayes told the appellant that Dyar had "promised us State deposits."

Hayes acknowledged that other business was discussed and said, "it was discussed about a corporation that was going to be formed to get letters from some nine banks to consolidate some loans." At that point, he identified State's Exhibit No. 16, a letter of guarantee for the letter of credit. The letter of guarantee reads:

"To Selected Banks of Alabama, from:

Melba Till Allen. Gentlemen: As the holder of this letter, you are hereby guaranteed by me that I accept total responsibility for any Letter of Credit issued by you to Leisure and Development Properties, Inc., according to the terms and conditions of said Letter of Credit.

"I have read and understand the terms and conditions of your Letter of Credit, thus making this letter my personal irrevocable guarantee to pay same.

"Copy of this letter will serve the purpose as the original. Sincerely yours, Melba Till Allen."

Hayes also identified State's Exhibit No. 9, a document given to him by Dyar. Hayes stated that he had a copy of the document in his office at the bank. That document was signed by the appellant and read:

"To: Selected Banks of Alabama. From: Melba Till Allen. Gentlemen: This letter will introduce Mr. V. C. Dyar, who is assisting me in the formation and combining of various properties owned in part and in whole by me.

"Mr. Dyar will explain in detail the proposed plan of action I am seeking to develop. Any courtesies

extended by Mr. Dyar on my behalf, and any assistance you might render will be greatly appreciated."

According to Mr. Hayes, after the meeting at the Sahara he met Dyar in the office at the bank. At that time Hayes received a $225,000 State deposit dated September 2, 1977. Further, he testified that the deposit was in the form of a check payable to the American Bank of Geneva and was a "demand deposit."

Hayes recalled "Leisure Development" property being mentioned at the Sahara by Mrs. Allen. He identified State's Exhibit No. 19 by stating "it's a letter of credit extended by our bank to Mrs. Allen to Leisure Development Properties in Montgomery."

According to Hayes, the original of this letter was in his office. The letter read:

"Leisure and Development Properties, Inc., 1445 Federal Highway, Suite 100, Montgomery, Alabama. Gentlemen: We hereby establish our irrevocable Letter of Credit No. 1 in your favor, in the amount not exceeding $50,000.00 available by your draft or drafts drawn on us at sight on the follow-

ing conditions. . . ."

Hayes identified his signature on the Letter of Credit. After September 6, 1977, he spoke with Dyar again and asked that the Letter of Credit be sent back to the bank.

During cross-examination, Hayes acknowledged that calling the State Treasurer's office and requesting State deposits was normal procedure for banks. Also, he acknowledged that a normal Federal Reserve practice was to use couriers for delivering deposits.

Hayes testified that the Letter of Credit issued by the Bank of Geneva to Leisure Development Properties, Inc. was rescinded prior to a call from the appellant. Further, Hayes acknowledged that the amount of deposits were not unusual. He admitted that at the time the $225,000 deposit was made, it brought demand deposits in the Bank of Geneva to approximately $400,000.00. Hayes explained "it could have been because $225,000, had been taken out in August" and the $225,000 deposit would have replenished the amount held by the bank.

Hayes did not recall the exact dates

of withdrawal of the $225,000. deposit as it related to the application of the appellant's loan, but said "the withdrawal came before the application."

On further cross-examination, Hayes was asked:

"Q. Mr. Hayes, I'm a bit confused and to make sure I understand, I'll ask you, sir, whether or not the $500,000.00 the half million dollar deposit, and the $225,000.00 deposit came after Mrs. Allen's loan application?

"A. Yes, sir.

"Q. All right, sir. And did the $225,000.00 withdrawal come just prior to her loan application?

"A. Yes, sir."

Also, Hayes was asked whether the loan made to the appellant was made in the normal course of banking business. Hayes responded 'yes, sir'. He was then asked:

"Q. It was. I further asked you was this loan made to Mrs. Melba Till Allen in the expectation of any extra favors or extra preferred treatment at any time, and you told me, no. Is that correct?

"A. I don't recall--you asked me if I was expecting to be repaid,

and I said, yes, sir.

"Q. And when you said, 'repaid', I said, 'You expect that loan to be repaid?'

"A. Right.

"Q. And, in fact, we even started talking about if you made $50,000 loans around, you would have a hard time explaining to your Board of Directors and your depositors if you didn't expect to be repaid?

"A. That's right.

Finally, Hayes was asked:

"Q. I'll ask you, sir, whether or not you would have made the loan to Mrs. Melba Till Allen had you not expected State deposits?

"A. No. sir" [Emphasis added]

At the end of Hayes' testimony, the State rested its case and the defense moved to exclude based on the following grounds:

1) "There has been no understanding proven as required by law." (2) The evidence submitted concerning the loan at the National Bank of Commerce had not been "tied up". Defense counsel submitted, "It was put in there intentionally to try to prejudice the jury, and it has not been

tied up."

At that point, the court said:

"Well, I feel like there's sufficient circumstantial evidence to go to the Jury; otherwise, a case such as this could never be proven. I think these are questions for the Jury to determine, so I deny your motion."

On the following day, after the trial had recessed, the defense attorneys added these grounds:

"[T]his provision under Section 3, sub(a) of the Alabama Ethics Law, we would say, first there has been no showing that there was a direct personal financial gain to the defendant. Rather, the only charge against her is that she received credit or a loan. We submit to the Court that that is not, as a matter of law, a direct personal financial gain. Further, there has been no evidence that it is, as a matter of evidence. So, a failure to show that element of offense, the Motion to exclude should be granted.

"Secondly, we would submit to the Court that the words, 'no public official shall use an official position to obtain direct personal financial gain,' --in that sentence 'use' and 'gain' are referred to, and again

> in the last sentence of Section 3, sub(a) where it says, 'unless such use and gain are specifically authorized by law.' We say, first, that the use, as charged in the indictment is that the State Treasurer deposited money in The American Bank of Geneva, a State chartered banking institution.
>
> "We say, first, that as charged in the indictment, and strictly according to the proof that use was, in fact, specifically authorized by law. Secondly, that the gain arguendo, assuming that a loan is a direct personal gain, that the gain, namely, getting the loan, signing the note at the bank, is specifically authorized by law. In short, that the proof is not only failing, but affirmatively shows the contrary; that being, that the use of the office and the gain received are both specifically authorized by law."

The court again denied the motion and the defense presented the case for the appellant. The appellant did not take the stand but called twenty-four character witnesses who testified as to her good character.

I

The appellant complains that she was

denied effective counsel "by the court's continuance of CC-78-319 and immediate resetting of CC-78-320 [the case under review without allowance of additional] time for preparation and subpoena of witnesses."

In support of this contention, the appellant has cited Mars v. State, Ala. Cr. App., 339 So.2d 104. In that case, Mars had retained a Birmingham attorney, but on the date of trial, the attorney was not present. However, Mars was represented by an attorney who had been appointed to represent him at arraignment. After arraignment, the appointed attorney had withdrawn in deference to retained counsel. When the retained counsel did not appear, the judge requested that counsel originally appointed to represent Mars for arraignment purposes sit with Mars to protect his rights during the trial.

After the jury was sworn, appointed counsel moved for a continuance on the grounds that other cases appeared on the docket ahead of the Mars case and that Mars' retained counsel had informed the State that he would appear in court that afternoon. At that time the district at-

torney informed the court that retained counsel had stated in a telephone converstion that he did not represent Mars. Further, the district attorney asserted that, because appointed counsel had represented Mars at arraignment and was present, the case should go forward. At that point, appointed counsel represented to the court that she had withdrawn from the case after the arraignment and was not supposed to represent Mars on the day of trial.

The facts in Mars indicate that, after retained counsel did not make an appearance appointed counsel had only minutes to prepare a defense.

The court determined that, under the circumstances, the trial court had abused its discretion by forcing Mars to trial. This case is clearly distinguishable from the case at bar on the facts alone. The appellant, in the present case, at all times had retained counsel. From the record we note that on March 30, 1977, at the time of her arraignment on the four cases, she was represented by retained counsel. At that time, case number CC-78-319 was set for trial on May 8, 1978, case

number CC-78-320 was set for trial on May 22, 1978, case number CC-78-321 was set for trial on June 5, 1978, and case number CC-78-322 was set for trial on June 19, 1978.

On April 27, 1978, a hearing was held on motions filed by the appellant in the above numbered cases, and an arraignment was conducted in CC-78-402. At that time, the appellant was represented by retained counsel, and case number CC-78-402 was set for trial on June 26, 1978.

On May 4, 1978, at proceedings to consider motions filed by the State and the defendant, the appellant was represented by different retained counsel.

At this time, the court informed the new attorneys that the cases had been set in chronological order and that case number CC-78-319 had been set for May 8, 1978 and case number CC-78-320 was set for May 22, 1978.

It is clear that the appellant's case is distinguishable from Mars. The appellant in the instant case was represented by retained counsel at the time of her arraignment until the completion of her trial on May 24, 1978. We note that, al-

though there was a change in representation on April 27, 1978, the second group of lawyers had approximately three weeks to preparethe appellant's defense. As the appellant recognized in her brief, the "matter of continuances are addressed to the sound discretion of the trial court and without a showing of clear abuse, the trial court's decision will not be disturbed on appeal". Haback v. State, 338 So.2d 439; White v. State, 44 Ala. App. 312, 208 So.2d 22; Pendley v. State, 43 Ala. App. 140, 181 So.2d 624.

Finally, we note that the day when the trial was actually begun, May 22, 1978, was the date that the presiding judge had originally assigned for the trial. Under these circumstances, the appellant and her attorneys had ample opportunity to prepare her case, and the court's decision to deny continuance was not an abuse of the court's discretion.

Also, our examination of the entire record reflects that the appellant has not shown that she was, in fact, denied effective assistance of counsel because of the insufficient time to prepare her case. It was not shown that counsel's

assistance was so grossly inept as to shock the conscience of the court and to make the proceedings "a farce and mockery of justice". Freeman v. State, 43 Ala. App. 406, 191 So.2d 245; Walker v. State, Ala. Cr. App., 355 So.2d 755; Robinson v. State, Ala. Cr. App., 361 So.2d 1174.

Appellant insists that she was not afforded competent counsel when "testimony showed lead counsel was suffering from apparent drug abuse and associate counsel was forced to withdraw". Counsel argues that because "lead counsel was taking a great quantity of pills and was behaving in a generally slovenly manner," appellant was denied due process.

The Supreme Court of Alabama, in Taylor v. State, 291 Ala. 756, 287 So.2d 901, when determing the question whether a defendant was effectively represented, observed that the 5th Cir. Court of Appeals reviewed Williams v. Beto, 354 F.2d 698, wherein the court stated:

> "It is a general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce or mockery of justice, or was shocking to

> the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation." [Emphasis added]

The Supreme Court in Taylor v. State, supra, went on to say:

> "The 'mockery of justice' rule is frequently cited as a minimum standard of competence and efficacy. Other factors often mentioned include the fairness of the trial as a whole, the reasonableness of counsel's assistance, loyalty to client, good faith, and the nature and extent of counsel's pre-trial preparation and opportunity for conference." [Footnotes omitted]

The Supreme Court in Taylor, supra, recognized:

> "The nature of the problem of misrepresentation is further reason for the lack of an all-encompassing definition of 'effectiveness' or 'ineffectiveness'. Effective assistance does not mean counsel is without error. What may later seem to be error may have been a trial tatic at the time. Further, conviction of a client does not prove the lack of skill or zeal on the part of counsel." [Citation omitted]

In Herring v. Estel, 491 F.2d 125 (5th Cir.) the court stated:

> "The governing standard is reasonably effective assistance. One method of determining whether counsel has rendered reasonably effective assistance is to ask whether the proceedings were a farce or a mockery. The farce-mockery test is but one criterion for determining if an accused has received the constitutional required minimum representation (reasonably effective assistance)." [Citations omitted]

We have reviewed the testimony in the hearing on the motion for a new trial. In that testimony, we found that one of appellant's attorneys stated that lead counsel was showing "some slurred speech,.. lack of coordination, stumbling around, saliva was running out of the sides of his mouth." Further, appellant's attorney said that he had seen lead counsel take some sort of unknown pills and that they were taken in a large quantity. Also, he stated that, because of lead counsel's condition, the matter was brought to the court's attention.

The judge, during the hearing, stated that he had observed lead counsel and, "I didn't see anything that I thought was

wrong with his examination or was not proper in the courtroom, from my observation. But, out of an abundance of caution and I think you will recall, that I said we would adjourn the case and come back in the morning, and that was the last I heard about it."

Counsel went on to say in conclusion, that, in his opinion, lead counsel's "actions and his condition had a good deal to do with the outcome of the case... in my opinion it did have an adverse effect in the presentation of her defense...."

At the conclusion of the testimony on the motion for a new trial, the court stated:

> "I want the record to reflect that as far as I was concerned in my observation of Mr. Jordan, I saw nothing wrong in his approach of trying the case as a lawyer."

We have examined the record and transcript of evidence in the appellant's case to determine whether lead counsel had rendered "reasonably effective assistance" as a defense attorney for the appellant. We recognize at the outset that our examination is confined to the written word

which comes through the record and transcript of evidence. Under these circumstances, we cannot determine precisely what effect the conduct of the lead counsel might have had in rendering effective assistance of counsel.

This court does not have the luxury of viewing first hand the activities of counsel during the progress of trial while the evidence unfolds before the jury. The trial judge is in a far better position than we are to determine whether the lead counsel's conduct was such that it did not afford this appellant "reasonably effective assistance of counsel.

However, we note,from our examination of the record and the transcript of evidence, numerous motions were filed on behalf of the appellant, countless objections were made at the time of trial, many motions for a mistrial were made, and at the conclusion of the trial, a motion to exclude the State's evidence was made. Based on the foregoing, we do not believe that the appellant has shouldered the burden of proving her claim that she was denied effective assistance of counsel. Although we clearly do not condone the use

of narcotics by a trial counsel during the trial of a client's case, we are also aware that nowhere in the record does it indicate that the use of narcotics was brought to the attention of the trial judge, nor is it intimated that they were used in contravention of the law. Therefore, under the specific circumstances outlined in appellant's contention, the appellant's burden to prove a claim of ineffective assistance of counsel was not supported. See Herring v. United States, 389 F. 2d 281.

III

The appellant contends that the denial of her request for grand jury testimony of State's witnesses was error. She argues that, "where a witness had taken the stand and a transcript of his grand jury testimony was in the district attorney's office not in possession of grand jury," the appellant should be given access to that witness's testimony before the grand jury.

This court in Sullivan v. State, 43 Ala. App. 302, 189 So. 2d 593, held that the trial court in its discretion may allow defense counsel to look at grand

jury notes. In Sullivan, defense counsel requested that he be permitted to look at the grand jury notes so that he might better cross-examine the prosecuting witness. The court refused the request, but inquired of the State's attorney whether he had referred to the grand jury notes during his examination of the witness. The State's attorney replied that he did have the notes before him but he had not referred to them during the questioning of the witness. At that point, the court stated that, if the prosecuting attorney had examined the witness from grand jury notes, then the defense attorney would have had the right to inspect them.

Under the circumstances in the case under review, we do not have a factual situation similar to that in Sullivan supra. Nowhere is it shown that the district attorney was examining any of the witnesses from the grand jury notes. See Hammonds v. State, Ala. Cr. App., 364 So. 2d 280. Therefore, it is our judgment that no abuse of discretion was shown here.

IV

The appellant, by way of demurrer and motion to dismiss, asserted that the statute under which she was being prosecuted was unconstitutional. She also asserts that during the hearing on motion for a new trial other grounds were raised which showed the statute was unconstitutional because it was never properly implemented.

She argues that the due process procedures which were mandated were never implemented and that these procedures were a condition precedent to implementation. The appellant maintains she was not afforded due process because she was never given a hearing, was not allowed to confront her accusers, and was not allowed to review the evidence against her.

The Alabama Supreme Court in Comer v. City of Mobile, 337 So. 2d 742, considered the constitutionality of Act No. 130 of the Alabama Legislature, Regular Session 1975, and found the Act "not vague or overbroad." Further, the court recognized that the Act was constitutional when it stated:

"The purpose of Act No. 130

was not so altered as to bring the taint of unconstitutionality to all of its sections not heretofore stricken."

Therefore, it is our judgment that Act No. 130 of the Alabama Legislature, supra, was found to be constitutionally sound in Comer v. City of Mobile, supra.

We now turn to the assertion that the appellant was never afforded a due process hearing where she could confront her accusers and review the evidence against her. Act No. 130, supra, has been codified in the Code of Alabama 1975, in § 36-25-1 through § 36-25-30. Section 36-25-5, entitled "Use of Official Position or Office for Personal Gain" was the section under which the appellant was prosecuted. That section reads:

"(a) No public official or employee shall use an official position or office to obtain direct personal financial gain for himself or his family, or any business with which he or a member of his family is associated, unless such use and gain are specifically authorized by law. . ."

Section 36-25-27, reads, in pertinent part:

> "(b) All prosecutions for violations of the provisions of this chapter shall be initiated and prosecuted by the attorney general of the state or by the district attorney having jurisdiction of the offense." [Emphasis added].

This provision of Act No. 130, as codified in the Code of Alabama 1975, specifically directs that prosecution for violations of Chapter 5, the code of ethics for public officials and employees, is to be initiated and prosecuted by the district attorney. Although the "ethics commission" established under this Act has the authority to investigate and to report suspected violations to the appropriate law enforcement authorities, nowhere is it mandated that the commission has any authority to prosecute. Affording the appellant in the present case a hearing before the commission would not have prevented the district attorney or the attorney general of Alabama from prosecuting a violation of this Act. It was for the district attorney or the attorney general to determine whether a prosecution was to be identified.

Certainly, we do not believe that

appellant can reasonably maintain that she was not afforded due process at the jury trial by her peers. She was given an opportunity to confront her accusers and to review the evidence against her.

V

The appellant maintains that Act No. 130, supra, is also unconstitutional because the legislature, by the passage of this Act, has "abrogated the Separation of Powers by seeking to remove an Executive Office when such can only be accomplished by Impeachment."

She argues that constitutional officers, such as the Treasurer of Alabama, can only be removed by way of impeachment as specified in the Constitution of Alabama, Article 7, § 1. She insists that any attempt to remove such an officer by way of indictment and trial would be to accomplish indirectly what could not be accomplished directly. We again turn to § 36-25-27, Code of Alabama 1975, which reads, in pertinent part, as follows:

> "(c) The penalties prescribed in this chapter do not limit the power of either house of the legislature to discipline its

> own members or to impeach public officials and do not limit the powers of agencies or commission to discipline their respective officials or employees."

Any prosecution under the provisions of this Act would in no way amount to impeachment. Offenders of this provision of the Act can only be fined"not more than $10,000, or. . . shall be imprisoned for not more than 10 years or both."

Nowhere in this Act is there a provision for the removal of an officer by way of impeachment. On the contrary, it specifically mandates that the penalty prescribed by this chapter in no way limits the power of the legislature to impeach public officials. § 36-25-27-(c) supra.

Based on the foregoing, it is our judgment that Act No. 130, supra, is not unconstitutional.

VI

The appellant claims that the district attorney was guilty of prosecutorial misconduct "by his bringing the indictment of Mr. E. A. Gregory three days before the trial of CC-78-319 [in which Mr.

Gregory was to testify] for the sole purpose of continuing CC-78-319."

The duties of the district attorney are found in § 12-16-209, Code of Alabama 1975, which reads as follows:

> "The district attorney must attend before the grand jury when required by them, and he may do so whenever he sees fit for the purpose of examining witnesses in their presence or giving them legal advice as to any matter connected with their duties; and he may appear before them at any time to give information as to any matter cognizable by them but he must not be present at the expression of their opinions or the giving of their votes on any matter before them. . . ." [Emphasis added].

After the grand jury has been empanelled, the circuit judge in the county where they are organized instructs the grand jury "relative to the criminal laws of this state. . . (b) It shall likewise be the duty of these judges to charge the grand jury as to all other matters which may be required by law and to instruct the grand juries that it is their duty to indict for the above named offenses, if, in the opinion of the grand jury, the

evidence justifies the indictment." Code of Alabama 1975, § 12-16-202.

Further, the concurrence of twelve jurors is required for the finding of an indictment, Code of Alabama 1975, § 12-16-204 reads as follows:

> "The concurrence of at least 12 grand jurors is necessary to find an indictment, and when so found it must be endorsed 'a true bill' and the endorsement signed by the foreman."

The powers and duties of the district attorney are set out in Code of Alabama 1975, § 12-17-184, which, in pertinent part, reads:

> "It is the duty of every district attorney and assistant district attorney, within the circuit, county or other territory for which he is elected or appointed:
>
> "(1) To attend on the grand juries, advise them in relation to matters of law and examine and swear witnesses before them.
>
> "(2) To draw up all indictments and to prosecute all indictable offenses."

We recognize that it is within the discretion of the district attorney to call or not to call certain witnesses in the presentation of the offense before

the grand jury although those witnesses are subpoenaed by the district attorney, the foreman of the grand jury or the clerk of the circuit court, "on the application of the grand jury." § 12-16-197, Code of Alabama 1975. See also § 12-16-198.

Whether a particular person is indicted for an offense is a matter addressed to a grand jury. As the appellant recognizes, the district attorney is not present while the grand jurors are expressing their opinions on matters before them, or when they are voting on any matter under consideration.

Under the circumstances outlined in this contention, we find no actions by the prosecutor which would constitute misconduct. All of his actions were in accord with the law and his duty as a district attorney.

VII

The appellant claims that the trial court committed reversible error when it allowed the State to introduce "myriad pieces of evidence, or testimony of other crimes or alleged acts of misconduct of the appellant."

She argues that this testimony and evidence were admitted in total disregard and in violation of the laws of evidence of the State of Alabama. Further, she says the evidence was irrelevant, inflammatory and so prejudicial that she was entitled to a new trial.

The evidence objected to by the appellant, as noted in her brief, is substantially as follows:

(1) Francis Merrifield's testimony concerning Stars Over Alabama, Consolidare Inc. and the National Bank of Commerce in Birmingham.

(2) Merrifield's testimony about a letter of guarantee from Merrifield to Mr. Charlie Martin, President of National Bank of Commerce, the subject of the letter being a $100,000 loan.

(3) Testimony by William R. Robertson, Jr., a pilot for E. A. Gregory, concerning the flight log of the plane and who had ridden in it.

(4) The introduction of a picture of Gregory's plane used by Dyar and Sutton to fly to DeFuniak Springs, Florida.

(5) Testimony by Sutton concerning the following:

a) "A conversation at which the Appellant was present about a $100,000 loan with the National Bank of Commerce and Stars over Alabama. There was no testimony that the Appellant participated, but the Court ruled she need only be present, see CC-78-321.

b) "A hearsay statement purported to be made by Mr. E. A. Gregory that 'I don't know this fellow here, but Mrs. Allen is welcome to use my plane any time she wants to.' See CC-78-319.

c) "The witness claimed to have carried a letter from Mrs. Allen to Mr. Merrifield which was subsequently destroyed. He then testified to its contents, see CC-78-321.

d) "That he had seen the Appellant sign two checks, one for $5,000 cash and one for $10,000 cash.

e) "On redirect he claimed to have seen Mrs. Allen sign the name of Louise Nolen to a Certificate of Incorporation of Sand, Inc. and that she had said 'I can sign her name as good as she can.' The appellant has yet to be indicted for forgery.

f) "That the Appellant had written a $10,000 check on the National Bank of Commerce of Birmingham payable to the Life Insurance Company of America. CC-78-321."

(6) Ray's testimony about a $5,000 check cashed by Sutton which "bounced."

(7) Hayes' testimony about a personal

letter of guarantee given by Mrs. Allen to selected banks of Alabama.

It is elementary that evidence of a distinct substantive offense is not admissible in support of another offense. Gassenheimer v. State, 52 Ala. 313. Although evidence of any offense other than that specifically charged to appellant is prima facia inadmissible, such evidence will be received as an exception to the general rule.

In Dennison v. State, 17 Ala. App. 674, 88 So. 211, we find the following exceptions:

> "[W]hen necessary to prove the scienter or guilty knowledge, when an element of the offense charged; (2) when the offense charged and the offense proposed to be proved are so connected that they form part of one transaction; (3) when it is material to show the intent with which the particular act is charged as criminal was done, evidence of another similar act, though in itself a criminal offense may be given; (4) when it is necessary to prove a motive for the criminal act imputed, and there is an apparent realtion or connection between that act and other criminal acts committed by the accused;

(5) when it is necessary to prove the identity of the offender, or of an instrument used in committing the offense; (6) there are also cases in which the accusation itself involves a series of acts which must be proved to make out the offense; (7) and cases in which the several offenses are all a part of the res gestae."

The Supreme Court of Alabama in Wilkins v. State, 29 Ala. App. 349, 197 So. 75, stated:

"[T]hat in a criminal prosecution proof which shows or tends to show that the accused is guilty of a commission of other crimes or offenses at other times, even though of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purposes of showing the commission of the particular crime charged unless the other offenses are connected with the offense for which he is on trial. In other words, proof of such collateral offenses cannot be used as substantive evidence to establish the guilt of the accused as to the crime charged." [Emphasis added].

The Supreme Court went on to say:

"This well established principle of criminal evidence, however, is subject to several equally established exceptions. . . ."

The court continued.

> "But this general rule is not to be followed blindly and evidence rejected on the sole ground that it does show the commission of another crime. If evidence is relevant and competent, it should be admitted regardless of its incidental effect. [Emphasis added].

The court went on to quote Underhill's Criminal Evidence, Fourth Edition, § 181, p. 318:

> "The exceptions to the general rule arise either from the necessity of the case or the nature of the offense, as for example. . . .when the intent or motive is to be proved from the circumstances, or where the identity of the accused is expressly an issue."

The Supreme Court of Alabama then stated that all the exceptions were listed in Wharton's Criminal Evidence, 10th Ed., Vol. 1, § 30, p. 59.

After quoting the exceptions the court stated:

> "It is recognized that in many instances the line of demarcation is not clear, but the discretion vested in the trial judge, intelligently and considerably exercised, will enable the prosecution fully to present the

charge, on the one hand, and, on the other hand, to protect the accused and secure to him the rights guaranteed to him by the Constitution and the laws." [Emphasis added]

There are other cases which recognize these exceptions to the general rule. McCray v. State, 37 Ala. App. 661, 74 So. 2d 487; McCary v. State 39 Ala. App. 642, 107 So. 2d 903; Govan v. State, 40 Ala. App. 482, 115 So. 2d 667; Johnson v. State, Ala. Cr. App. 335 So. 2d 663; Jones v. State, Ala. Cr. App., 362 So. 2d 1303.

In the present case, we are concerned with the relevancy of the evidence and testimony as pointed out by the appellant in brief, and wehther this evidence and testimony was admissible under the exception to show intent, scheme or design.

In Underhill, Criminal Evidence, 4th Ed., § 184, p. 333, we find:

"All evidence is relevant which throws, or tends to throw, any light upon the guilt or innocence of the prisoner. And relevant evidence which is introduced to prove any material fact ought not to be rejected merely because it proves, or tends to prove that at some other time or at the same time the accused has been guilty of some other

separate, independent and dissimilar crime. The general rule is well settled that all evidence must be relevant. If the evidence is relevant upon the general issue of guilt, or innocence, no valid reason exists for its rejection merely because it may prove, or may tend to prove, that the accused committed some other crime or may establish some collateral and unrelated fact." [Emphasis added].

See Moore v. United States, 150 U. S. 157 37 L. Ed 996, 14 S. Ct. 26.

In McElroy's Alabama Evidence, 3rd Ed., § 69.01(1), p. 135, we read:

"However, it must not be considered that such a listing of admissible purposes was intended to be exhaustive. It must ever be borne in mind that the State may prove the accused's commission of another crime if such other crime is relevant for any purpose other than that of showing his guilt through the medium of bad character." [Emphasis added.]

Also, we find in McElroy, supra;

"The foregoing exclusionary rule does not work to exclude evidence of all prior crimes, only such is offered to show the defendant's bad character. If the defendant's commission of another crime or misdeed is an element of guilt,

> or tends to prove guilt via bad character, then proof of such other act is admissible." [Emphasis added].

Finally, at § 69.01(6) in McElroy, supra, we see:

> "Evidence of the accused's commission of another crime is admissible if such evidence, considered with other evidence in the case, warrants a finding that both the now-charged crime and such other crime were committed in keeping with or pursuant to a single plan, design, scheme or system."

Lindsey v. State, 41 Ala. App. 85, 125 So. 2d 716; Whitehead v. State, 16 Ala. App. 427, 78 So. 467.

In the present case, the contention of the appellant that the evidence and testimony of other acts were inadmissible because they tended to prove that she was guilty of other crimes is not sustained. It is well settled by the foregoing decision that, while evidence of a commission of one crime is not inadmissible to establish a party's guilt to the charged crime, such evidence is admissible if relevant to prove another crime. Where such evidence forms a link in a chain of circumstantial facts which lead to the

transaction involved, we think there can be no doubt under the authorities that such evidence is admissible.

The evidence at appellant's trial showed that two corporations in which she was involved were in need of money. Also, there was testimony tending to show that a plan was designed to obtain loans from State banks by offering those banks large deposits in exchange for those loans. Further, the evidence shows that the first attempt was to obtain money from the First National Bank of Commerce in Birmingham. The testimony in this regard involved the making of a loan application and the signing of signature cards and promissory notes, followed by a trip to Florida on an airplane belonging to E. A. Gregory. The purpose of the trip to Florida was to gain Merrifield's signature as a guarantor of the loan.

There was evidence which showed that, because the appellant wrote checks on the bank, she was under the impression that the loan had been made. However, when it was learned that the loan had failed, the appellant then turned to the American Bank of Geneva. At this time, signature cards,

a loan application and notes were signed by the appellant in exchange for placing State deposits in this bank. The president, Mr. Hayes, granted the loan to the appellant.

The evidence recited above reflects that the State proved its case against the appellant. All the evidence was actually a part of one transaction engaged in for the purpose of obtaining financing in exchange for placing State deposits. In this regard, we find that the evidence was relevant to the offense being tried.

After a careful examination of the evidence and testimony, which appellant contends was erroneously admitted, we are clearly of the opinion that no reversible error was shown. Also, we find nothing which requires, or would justify an interference with the judgment.

VIII

The appellant has challenged the sufficiency of the State's evidence in motions to exclude and for a new trial.

In the matter of the appellant's association with the different organizations, the foregoing facts show:

> "The appellant apparently had some interest in the development of the park [Stars Over Alabama].
>
> "SAND is an acronym derived from the last names of Bonny Ray Sutton, Melba Till Allen, Louise Nolen, and M. F. Dyar.
>
> . . . .
>
> "Leisure and Development Properties, Inc. (Leisure) was a corporation organized by the appellant and others apparently for the purpose for consolidating certain loans by obtaining letters of credit from various banks in Alabama." [Emphasis added].

Therefore, the evidence presented at trial and recited above shows Mrs. Allen's involvement in the above named organizations. Her connection with these organizations was also shown when she signed a $100,000 promissory note to obtain a loan for Stars over Alabama, Inc. This note, endorsed by Merrifield, was issued by the National Bank of Commerce in Birmingham, (NBC), in exchange for a deposit in NBC of $200,000.

The evidence reflects that the appellant and Dyar were assisting Merrifield nad his group [Consolidare] in ob-

taining the loan of $2,100,000 for Consclidare, Inc. Additionally, at the time the $100,000 note was issued by NBC, a vice-president of NBC in Birmingham, Ferd Weil, was also a member of the Board of Directors of Consolidare, Inc.

The evidence shows that NBC never made the two loans to the appellant and Merrifield. However, we note that the entire scheme portrayed by the evidence was the development of an Alabama theme park, "Stars Over Alabama" which was to be similar to "Six Flags Over Georgia." SAND, Inc., over ten percent of which was owned by appellant, was organized for the purpose of owning and operating resort properties. SAND, Inc. was to purchase Point Aquarius, a resort. Louise Nolen signed, as appellant did, the $100,000 promissory note, the purpose of which was to obtain a loan for Stars Over Alabama, Inc., and she, as well as appellant, was a stockholder in SAND, Inc.

See Forest Hill v. Latter & Blum, 349 Ala. 23, 29 So. 298, where the Supreme Court of Alabama observed:

"The motion of separate corporate existence will not be recognized

> where a corporation is so organized and controlled and its business conducted in such a manner as to make it an instrumentality of another. . . . The fiction was introduced into the law for certain well-known purposes, but it was not invented to promote injustice or justify wrongs and when so used it should be disregarded. The courts will not allow the corporate entity to successfully masquerade through its officers, stockholders, representatives or associates. . . ." [Emphasis added].

From such evidence, the jury could reasonably conclude: (1) That Point Aquarius was to be the site for "Stars Over Alabama," or for a resort designed to financially aid "Stars" through its profits; (2) that Stars Over Alabama, Inc. and SAND, Inc. were organized for the same ultimate purpose, the development of a theme park, and; (3) that the $100,000 promissory note which appellant signed was, therefore, on behalf of SAND, Inc. Although the $100,000 loan was never completed, the loan was solicited in exchange for a deposit of State funds by the State Treasurer (Melba Till Allen).

Other actions taken by the appellant

indicated her direct association with two of the corporations involved in these transactions. On the date of SAND'S incorporation, Mrs. Allen gave M. F. Dyar a check "for expenses" related to that corporation. She also drew the check used as a binder for the purchase of Point Aquarius, such purchase being a purpose of SAND'S incorporation. The failure to purchase Point Aquarius and, therefore, the fact that the binder check was never presented for payment or cashed is immaterial to the issue of Mrs. Allen's connection with SAND, Inc.

On August 10, 1977, the appellant and Mrs. Louise Nolen signed a $50,000 promissory note issued by the American Bank of Geneva. We note that appellant and Mrs. Nolen were co-signers of the $100,000 promissory note issued by NBC in Birmingham.

We also note there was evidence that the appellant received cash from that note. The $50,000 promissory note contains a notation of $1,125.00 interest paid on September 12, 1977. A payment of interest to keep a note current would indicate that the $50,000 loan was con-

summated. Merrifield testified that he learned from Mrs. Allen of the $100,000 loan being refused by NBC. He also testified that he learned from Mrs. Allen of the $100,000 loan being refused by NBC. He also testified that Mrs. Allen "was under the impression the loan had gone through and they had written checks to the amount of forty or fifty thousand dollars that were outstanding when it was turned down." Merrifield suggested "that they could possibly get fifty thousand dollars at the American Bank in Geneva, Alabama to make her checks good. He also testified that appellant, in response to his suggestion said, "she would put some State funds down there to help the situation." After his conversation with appellant, Merrifield visited, during July, 1977, with Hayes, one of the prime owners of the American Bank of Geneva, in Geneva, Alabama, for the purpose of discussing a $2.1 million loan for Merrifield and a $50,000 loan for the appellant. It was understood at that time that the State deposits for the American Bank of Geneva would be forthcoming.

On August 10, 1977, appellant signed the promissory note for $50,000, issued by the American Bank of Geneva; on August 24, 1977, a time deposit of $500,000 in State funds was placed in the American Bank of Geneva, and on September 12, 1977, a demand depsoit of $225,000 in State funds was placed in the American Bank of Geneva. From this evidence the jury could have reasonably inferred that a $50,000 loan was made by the American Bank to Melba Till Allen in exchange for State deposits being placed in the American Bank.

Appellant issued a written personal guarantee to pay any Letter of Credit issued to Leisure and Development Properties, Inc. The issuances of the promissory note and the Letter of Credit by the American Bank of Geneva were done in return for the $725,000 in State funds to be deposited in that bank. The fact that the Letter of Credit was later rescinded was immaterial to the issue of appellant's involvement in Leisure.

It may be contended that appellant's personal guarantee on the $50,000 Letter of Credit to Leisure is no indication of

any interest of appellant in that corporation. However the Alabama Surpeme Court upheld a finding that evidence presented, including evidence that the defendant personally assued responsibility for liabilities, support a finding that it was appropriate to treat the corporation and defendant as identical. Cohen v. Williams, 294 Ala. 417, 318 So. 2d 279.

Finally, Mr. H. G. Hayes testified that he would not have made the loan to Melba Till Allen if he had not expected State deposits in return.

Sufficient facts were shown from which the jury could reasonably infer that the offense had been committed, therefore, the question was properly submitted to the jury. Hill v. State, 207 Ala. 444, 93 So. 460; Spain v. State, 37 Ala. App. 311, 68 So. 2d 53; James v. State, 22 Ala. App. 183, 111 So. 648.

The rule is clearly established that the weight and probative value of evidence are for the jury. Where there is legal evidence from which the jury can by fair inference find guilt, this court has no right to disturb the verdict. Bolton v. State, 21 Ala. App. 373, 108 So. 631;

Trussell v. State, 57 Ala. App. 109, Haggler v. State, 49 Ala. App. 259, 270 So. 2d 690; Smiley v. State, Ala. Cr. App. 338 So. 2d 491.

Therefore, based on the recited facts, it is our judgment that a jury could see through the corporate machinations and draw the inference that Mrs. Allen's association was for the sole purpose of promoting her corporate endeavors, all of which would ultimately redound to a personal gain on her part.

Under these facts, the evidence was sufficient to support the appellant's conviction; therefore, the judgment of conviction by the Montgomery Circuit Court should be affirmed.

AFFIRMED.

Harris, P.J., Tyson, Bowen, JJ., concur, Bookout, J., concurs in part and dissents in part.

BOOKOUT, J., concurring in part and dissenting in part

I concur in Parts I through IV, supra, but dissent with Part VII and VIII of the majority opinion.

From the State's evidence and reasonable inferences therefrom, the jury could have found the following facts to have existed:

Mrs. Melba Till Allen, at the time in question, was the Treasurer of the State of Alabama. As Treasurer, she had absolute discretion as to which banks received state deposits and the amount of each deposit.

"Stars Over Alabama" was a proposed theme part to be built in Franklin and Marion counties. The part was to be somewhat similar to one near Atlanta, Georgia, named "Six Flags Over Georgia." The appellant apparently had some interest in the development of the park, but the extent or percentage of her interest is unknown.

Consolidare, Inc., was a corporation organized for the purpose of acquiring an insurance company in Florida. Francis Merrifield, Ferd Weiil George Pihakis,

Bill Ellis, and Farris Ritchey were principals in Consolidare. Merrifield, a millionaire residing in DeFuniak Springs, Florida, apparently held a controlling interest in Consolidare. The appellant held no interest in that corporation.

The National Bank of Commerce (NBC) is a bank doing business in Birmingham, Alabama. Ferd Weil was a vice-president of that bank during the time in question.

SAND, Inc., was a corporation organized for the purpose of purchasing Point Aquarius from Life Insurance Company of America (LICA). SAND is an acronym derived from the last names of Bonny Ray Sutton, Melba Till Allen, Louise Nolen, and M. F. Dyar. The incorporating papers were signed on July 15, 1977, at Point Aquarius in Alpine, Alabama. Point Aquarius is a country club and resort consisting of approximately 1,200 acres of land.

Also included are a club house of about 50,000 square feet, a tennis shop, a pool house, a maintenance building, an olympic size swimming pool, an equestrian club, horse stables, two 18-hole golf courses, 64 or 65 condominiums, and

various other facilities. Point Aquarius is located in Talladega County.

Leisure and Development Properties, Inc. (Leisure) was a corporation organized by the appellant and others apprently for the purpose of consolidating certain loans by obtaining letters of credit from various banks in Alabama.

The American Bank of Geneva, Alabama, is located in Geneva County in the extreme southeastern corner of the state a short distance from the Florida state line. At the time in question, H. G. Hayes was the president or chief operating officer of that bank. Geneva County is located in what is commonly referred to as the "Wiregrass" area of the state. During the time in question, the Wiregrass area had been under a lengthy drought condition which had caused the local farmers to lose 80% to 90% of their corn crops. Since many farmers were unable to repay loans due the American Bank at that time, the bank was short of operating funds and was in need of deposits.

On July 7, 1977, the appellant, Vance Dyar, Sutton, Merrifield, Pihakis, and

Ellis met in the lobby of the Downtowner Motel in Montgomery. The parties at that meeting discussed the possibility of obtaining loans for Consolidare and Stars Over Alabama. The appellant and Dyar were to assist Merrifield and his group in obtaining a loan for $2,100,000 for Consolidare. In return Merrifield and Consolidare were to assist in obtaining a loan of $100,000 for Stars Over Alabama. Applications for the loans were to be made to NBC and Ferd Weil was a vice-president of NBC as well as a member of the board of directors of Consolidare.

The conversations concerning the loans were carred on in the appellant's presence; however, Dyar and Pihakis did most of the talking. Stars Over Alabama "had some bills that were past due that they were needing some funding for." To obtain the loans for Consolidare and Stars Over Alabama, the appellant was to assist by placing state funds in NBC. At one point in the conversation, Dyar asked the appellant if she saw any problems with that approach, and she said she "didn't see any problems in it."

Following the meeting at the Down-

towner, the appellant accompanied by Dyar and Sutton went to the State Treasurer's Office where she obtained a check for $200,000 of state funds to be deposited with NBC. Dyar, Sutton, and Pihakis then drove to Birmingham, spent the night, and delivered the state check to Ferd Weil at NBC on July 8. Weil then delivered to Dyar a promissory note for $100,000 and signature cards. Dyar and Sutton drove to Montgomery and met with the appellant and Mrs. Nolen at the Montgomery airport. The appellant and Mrs. Nolen signed the promissory note and signature cards and gave them back to Dyar. The group then met with E. A. Gregory and his pilot, William D. Robertston, Jr.

After a brief conversation, Dyar and Sutton boarded the airplane with the pilot, Gregory, and a Mr. Gerald Atkinson. The plane was owned by Faith Investment Corporation of which Gregory was the controlling stockholder. The plane then flew to Pensacola, where Gregory resided, and both he and Atkinson deplaned. Gregory had no further connection with the instant case. The pilot then flew Dyar and Sutton to DeFuniak Springs, Florida, where they

met with Merrifield who endorsed the promissory note and signature cards and gave them back to Dyar.

Dyar and Sutton flew back to Montgomery, drove to Point Aquarius, spent the night, and drove to Birmingham the next morning. They then went to NBC and gave Weil the documents signed by the appellant, Nolen, and Merrifield. However, NBC never made the two loans to the appellant and Merrifield.

On July 15, 1977, SAND was incorporated at Point Aquarius. At that time the appellant signed a check on NBC payable to cash and gave it to Dyar for expenses. Dyar had Sutton take the check to the Citizens Bank of Talladega, Alabama, cash it, and return the funds to Dyar. Some time around July 25, the president of Citizens Bank called the appellant and informed her that the check had not been honored by NBC due to insufficient funds. The appellant told him the check should be good as some funds should have been transferred to cover it and requested it be presented again for payment. Citizens Bank then returned the check to NBC, and it was honored and paid on July 25.

The appellant likewise wrote a check for $10,000 at Point Aquarius on July 15 payable to LICA. That check was written on NBC and used as a binder on the purchase of Point Aquarius by SAND. However, the sale of Point Aquarius did not take place and that check was never presented for payment or cashed.

On some unspecified date in early June 1977, H. G. Hayes telephoned the appellant requesting state deposits for the American Bank due to the drought conditions in Geneva County. On some unspecified date in July, Dyar and Merrifield came to the bank and picked up a $50,000 promissory note and signature cards from Hayes. As they departed Hayes reminded them that he needed deposits in his bank.

A copy of the $50,000 promissory note dated August 10, 1977, was admitted into evidence. That note was signed by the appellant and Mrs. Nolen. The credit approval space on the note contained a signature purporting to be that of Hayes although he testified that it was not his signature. There is no evidence that the appellant ever received any cash pro-

ceeds from the note. The bank later issued only a letter of credit. Some interest was paid on the note, but the record does not reveal who paid it.

On August 24, 1977, Dyar met with Hayes at the Geneva Airport and delivered a $500,000 state time deposit for the American Bank. Later, on some unspecified date, Hayes had dinner with the appellant in Montgomery at the Sahara Restaurant and asked for some demand deposits for his bank. The appellant explained that she could not give him a large deposit because the legislature was scrutinizing demand deposits very closely. However, she stated that she could give him some deposits in small increments. Thereafter, on September 2, Dyar delivered a $225,000 demand deposit to Hayes from the State Treasurer's Office.

On September 6, 1977, Hayes issued a letter of credit to Leisure. The letter of credit read in pertinent part as follows:

> "Leisure & Development Properties, Inc. "1445 Federal Hwy. Suite 100 "Montgomery, Al.
>
> "Gentlemen:

"We hereby establish our Irrevocable Letter of Credit No. 1 in your favor, in the amount not exceeding $50,000.00 available by your draft or drafts drawn on us at sight on the following conditions:

"1. The amount and date of negotiation of each draft drawn under this Letter of Credit must be endorsed on the back hereof by the negotiating bank and this Letter of Credit must be cancelled and attached to the draft which exchausts the credit.

"2. Drafts drawn under this Letter of Credit must be marked 'Drawn under the American Bank, Letter of Credit No. 1, dated September 6, 1977.'

"3. If the draft is drawn by a corporation, a corporate resolution evidencing the authority of the persons signing on behalf of the corporation must accompany the draft or have been previously furnished us.

"4. All drafts must be negotiated after Septmeber 6, 1980 (sic) and before September 16, 1980, on which date this Letter of Credit expires.

"5. We hereby agree with bonafied holders of this Letter of Credit that all drafts drawn under and in compliance with the terms of this Letter of

Credit shall be duly honored upon presentation and delivery at the American Bank, Geneva, Alabama, in accordance with the terms hereof.

"Sincerely,

"H. G. Hayes, Jr.
"President

"John T. Ward
"Chairman of the Board."

On some unspecified date after the issuance of the letter of credit, Hayes spoke with Dyar and requested that the letter of credit be returned to the bank. Dyar complied with the request and returned the letter of credit, likewise on some unspecified date. At some later unspecified time after the issuance of the letter of credit, appellant called Hayes and requested that the letter be rescinded. Hayes stated that he had already rescinded it at the time he received the appellant's call.

On August 11, the day after the $50,000 note to the American Bank was signed, the appellant wrote and delivered to Dyar the following letter:

"To: Selected Bank of Alabama

"From: Melba Till Allen

"Gentlemen:

"This letter will introduce Mr. V. C. Dyar, who is assisting me in the formation and combining of various properties owned in part and in whole by me.

"Mr. Dyar will explain in detail the proposed plan of action that I am seeking to develop. Any courtesies extended to Mr. Dyar on my behalf, and any assistance you might render will be greatly appreciated."

Likewise, on August 23, 1977, the appellant wrote, signed, and delivered to Dyar the following letter:

"To: Selected Bank of Alabama

"From: Melba Till Allen

"Gentlemen:

"As the holder of this letter, you are hereby guaranteed by me that I accept total responisibility for any Letter of Credit issued by you to Leisure and Development Properties, Inc., according to the terms and conditions of said Letter of Credit.

"I have read and understand the terms and conditions of your Letter of Credit, thus making this letter my personal irrevocable guarantee to pay same.

"Copy of this letter will serve the purpose as the original.

"Sincerely yours,

"Melba Till Allen."

H. G. Hayes testified that while having dinner with the appellant in Montgomery he told her that Dyar had promised him some state deposits. He did not recall what, if anything, the appellant replied. He did, however, recall other business being discussed at the meeting. "It was discussed about a corporation that was going to be formed to get letters of credit from some nine banks to consolidate some loans." The appellant's letter to selected banks of Alabama dated August 11, 1977, was identified by Hayes. He stated that he had one in his bank, but did not recall from who he received it. That letter was then introduced into evidence as State's Exhibit No. 9. Hayes next identified the appellant's letter of August 23, 1977, to selected banks of Alabama. He stated that the letter was given to him by Dyar, and it was introduced into evidence as State's Exhibit No. 16.

I

At the end of the State's case in chief, the defense moved to exclude the evidence on the ground inter alia that

there was no showing that appellant received a direct personal financial gain in the transaction with the American Bank. The trial court denied the motion. The existence of and extent of the appellant's interest in the corporation which received the letter of credit from that bank was a crucial element of proof at trial and now on appeal.

When the prosecution attempted to admit into evidence the American Bank's letter of credit to Leisure, the following occurred:

> "MR. JORDAN: (viewing document) It purports to be a letter dealing with Leisure Development Corporation or a business that we're unfamiliar with, and unless he can tie Mrs. Allen in as a stockholder, director, incorporator, or officer of Leisure, I don't see what it has to do with her. She may have been a guarantor for a note for them but that's all.
>
> "THE COURT: Does it have any connection with this?
>
> "MR. EVANS: Yes, sir. I believe this witness, Your Honor, testified that at the Sahara Mrs. Allen told him she was forming this holding company---
>
> "MR. JORDAN: Your Honor ---

"MR. EVANS: I believe you heard the witness. He said he was out at the Sahara and Mrs. Allen discussed with him the formation of a holding company there for her indebtedness.

"THE COURT: Of Leisure Company?

"MR. EVANS: Yes, sir. He said Leisure Development from the stand.

"THE COURT: Was that your testimony?

"MR. JORDAN: He didn't name the company ---

"MR. EVANS: Yes, he did. Let's play the record back.

"THE COURT: No, let's just ask him the question.

"MR. EVANS: All right.

"BY MR. EVANS: (Continuing)

"Q. Mr. Hayes, do you remember the Leisure Development property being mentioned at the Sahara by Mrs. Allen?

"A. Yes, sir.

"THE COURT: All right. Overrule your objection."
(Emphasis supplied.)

The letter of credit was then admitted into evidence and read to the jury.

The prosecution's representation to the trial judge was inaccurate. The record reveals that in Hayes' earlier

testimony he merely said, "It was discussed about a corporation that was going to be formed to get letters of credit from some nine banks to consolidate some loans." The only mention of Leisure was in the "Selected Banks" letter from appellant which Hayes read into evidence. Hayes did not say in his prior testimony that appellant told him she was forming Leisure, althought an inference can be drawn that Leisure was the corporation she was discussing. However, nothing in Hayes' testimony tends to prove the extent of her ownership or interest in Leisure. That the appellant mentioned "Leisure Development property" in the conversation likewise falls way short of proving the extent of her interest or ownership in that corporation.

The appellant's letter of August 11 to selected banks stated that Dyar was assisting in the "formation and combining of various properties owned in part and in whoe by me." She stated therein that Dyar would explain the proposed plan of action and stated that she would appreciate any courtesies extended to Dyar on her behalf. The August 23 letter to

selected banks stated that she guaranteed and accepted total responsibility for any letter of credit issued by such selected bank to "Leisure and Development Properties, Inc." She stated therein that she had read and understood the terms and conditions of the letter of credit from the selected bank or banks and that her instant letter was her personal irrevocable guarantee to pay the same.

That the appellant had some interest in securing a letter of credit for Leisure is obvious from the letters of August 11 and 23 received by Hayes. The extent of her interest or the percentage of her ownership in such business however is not disclosed in the record. No certificate of incorporation was introduced to connect the appellant with the ownership of the corporation, no testimony was given as to her ownership of the corporation, no testimony was given as to the proposed plan of action she was seeking to develop through Dyar and what connection such plan had with various properties owned in part or in whole by her.

The record does connect the transactions at NBC with appellant's desire

initially to obtain the loan or letter of credit from the American Bank of Geneva. The appellant was attempting to obtain a $100,000 loan through NBC in connection with developing the theme park Stars Over Alabama. The letter of credit from the American Bank of Geneva was to Leisure and Development Properties, Inc., and was for the purpose of some unstated "proposed plan of action" which she was seeking to develop. Merrifield testified that after the NBC loan was turned down he had a discussion with the appellant:

> "A. She was under the impression the loan had gone through, and they had written checks to the amount of forty or fifty thousand dollars that were outstanding when it was turned down.
>
> "Q. What, if anything, else did you say to her?
>
> "A. I suggested that they could probably get fifty thousand dollars at the American Bank in Geneva, Alabama, to make her checks good.
>
> "Q. And what, if anything, did she say to you after that?
>
> "A. She said she could put some State funds down there to help the situation."

Thus, the only connection between NBC

and the American Bank loan appears in Merrifield's testimony that "they" had some $40,000 to $50,000 in outstanding checks in NBC and that appellant would send some state funds to the American Bank to help in obtaining a loan to cover those checks. Stars Over Alabama then faded from the record. When the transaction with the American Bank was finally consummated in August and September, it involved not Stars Over Alabama, but Leisure and Development Properties, Inc.

There is little doubt that the appellant used her position to obtain a letter of credit for Leisure and Development Properties, Inc. The inference is that she had some financial interest in the corporation as she guaranteed and accepted responsibility for any letters of credit issued to Leisure. It is probable that the properties owned "in part and in whole" by the appellant with which Dyar was dealing had some connection with Leisure. The only thing that is clear is that Hayes issued the letter of credit to Leisure in return for not only the Allen-Nolen promissory note of August 10, but because of the state deposits which

appellant would place in the American Bank.

The placing of state deposits in banks to induce either personal or corporate loans is not mala in se, but is mala prohibita. Such conduct is only illegal because the Ethics Act of 1975 declares it to be so. And to bring that conduct within the prohibition of that Act, the State must prove each element of the offense as written by the legislature.

It is an age old principle in our system of justice that criminal statutes are strictly construed in favor of persons sought to be subjected to their operation. Schenher v. State, 38 Ala. App. 573, 90 So. 2d 234, cert. denied, 265 Ala. 700, 90 So. 2d 238 (1956). Such statutes reach no further in meaning than their words. Fuller v. State, 257 Ala. 502, 60 So. 2d 202 (1952). Therefore, regardless of how improper the conduct of an accused may appear, the State may not brand that person a criminal and imprison him except by strict proof conforming to the wording of the criminal statute in question.

The State proved that the appellant used her official position to obtain a letter of credit for Leisure and Develop-

ment properties, Inc. This alone amounts to no crime under the statute. The State must have also proved that through the letter of credit she obtained "a direct personal financial gain" for herself or for a business with which she was associated.

The evidence fails to establish a "direct personal financial gain" prohibited by the statute. The gain, if any, would have been through one of the corporations involved in the transactions. Under the specific charge in the indictment, it may only come through Leisure and Development Properties, Inc., in which she inferentially held some interest.

In order to prove the appellant's corporate dealings to be in violation of the Ethics Act, the State had the burden of proving that the financial gain was for a business with which she was associated, as defined in § 2(b) [now § 36-25-1 (2)]:

> "'Business with which he is associated' means any business of which the person or a member of his family, is an officer, owner, partner, employee or holder of more than 10% of the fair market

value of such business."
(Emphasis supplied.)

No proof was made that the appellant was an officer or employee of Leisure. It being a corporation, she could not have been a partner within the legal definition of that term. Ownership in a corporation is denoted by holding or owning stock therein. Therefore, for the appellant's actions to be in violation of the terms of the statute, the State must have proved that she owned or was the "holder" of "more than 10% of the fair market value of such business." This the State failed to do, and the appellant's motion to exclude the State's evidence should have been granted.

II

An additional ground for error appears in the record.

The State introduced into evidence the fact that the appellant gave Dyar a check for $5,000 on NBC which returned due to insufficient funds. The State likewise introduced the second check written by the appellant on NBC in the amount of $10,000 payable to LICA. Over objection by the appellant, the court

admitted those checks into evidence. Over the appellant's objection that the checks had no material connection with the transaction for which she was indicted, the prosecution argued, "I want to show, Your Honor, that at the time these checks were written, it (sic) wasn't enough money in the National Bank of Commerce to cover these amounts."

The defense then further objected:

> "MR. JORDAN: ... Your Honor, we submit and we firmly object, he's presenting evidence of a separate and distinct criminal offense under the laws of the State of Alabama involving a bad check with insufficient funds, it cannot be brought into this proceeding. It's grounds for a mistrial, and we move for a mistrial. He intentionally did that.
>
> "THE COURT: Motion denied. Motive? Is that what you're saying?
>
> "MR. EVANS: Yes, sir. She had to get money out of Geneva to cover these checks.
>
> "THE COURT: All right. Overrule your objection, and deny your mistrial. Proceed."

Again, the prosecution's representation to the trial judge was not factual. The evidence clearly reveals that the

checks in question were written on July 15, 1977. The $5,000 check was paid by NBC on July 25, 1977. The $10,000 check was never presented for payment. It bears no stamp denoting that it was refused due to insufficient funds. Over the appellant's objection as to relevancy, the trial court admitted the two checks into evidence to show motive. That is, the proseuction convinced the trial judge that the American Bank loan was motivated by the necessity to cover the July 15 checks written against insufficient funds. The record simply does not support such a finding.

The $50,000 loan application or note signed by the appellant was not dated until August 10, and the letter of credit issued thereon was not dated until September 6, 1977. Thus, the $5,000 check payable to cash had been honored and paid on July 25, some sixteen days before the loan application with the American Bank was dated.

There is no showing in the record that the appellant or any business with which she was associated had outstanding debts or checks pending against an in-

sufficient account at NBC at the time the appellant sought the loan from the American Bank of Geneva on August 10. The indebtedness referred to earlier in the appellant's first dealings with Merrifield and Consolidare were in connection with Stars Over Alabama. The evidence is unclear as to any connection between Stars Over Alabama and Leisure. The evidence is nonexistent as to any connection between those corporations and SAND, Inc. In fact, the entire evidence concerning the formation of SAND and the proposed purchase of Point Aquarius does not appear to have any material connection with the crime charged in the indictment. The checks introduced into evidence concerning SAND and Point Aquarius have no connection wiht the transactions in question with the American Bank. The only check shown by the evidence to have been returned was later paid on July 25, 1977, over two weeks prior to the appellant's loan application to the American Bank of Geneva and almost a month before the appellant sent a state deposit to the American Bank.

The SAND checks in question show that they were written on Account No. 403-259-0

at NBC. Although the bank officials and bank records were subject to subpoena, there is no proof in the record that Stars Over Alabama or Leisure had the same account number at NBC. In fact, there is nothing in the record to show when the SAND account was opened, the cause of the overdraft, the source of funds to cover the overdraft on July 25, whether checks in connection with Stars Over Alabama or Leisure were drawn on that same account, or which parties were authorized to draw on the account.

Although the incorporating papers for SAND were admitted into evidence, none appear of record for either Stars Over Alabama or Leisure. We cannot ascertain from the State's case in chief who the primary stockholders of those latter two corporations were. It is noted, however, that during the case for the defense transactions involving Stars Over Alabama were brought out on cross-examination of defense witness Clay Baker. State's Exhibits 20, 21, and 22 show the following individuals and corporations involved in those transactions in early April 1977 (without showing their

specific interest or ownership in Stars Over Alabama): C. Dewey Crowder, John Norman Firth, Louise H. Nolen, Melba Till Allen, Dewey Crowder Associates, Ltd., Hawthorne Melody Farms, Inc., and A. C. Baker.

With the exception of the appellant and Louise Nolen, none of the persons mentioned in the above transaction appear in the record as involved in the Stars Over Alabama-NBC loan, SAND, Inc., or the Leisure-American Bank loan transactions.

The only connection we can find between SAND and Leisure is the fact that Allen, Nolen, and one M.F. Dyar were stockholders in SAND and that Allen and Nolen endorsed the American Bank note and Vance Dyar acted somewhat as a courier in the transaction. SAND had an account at the same bank (NBC) where appellant was earlier trying to negotiate a loan for Stars Over Alabama, but there is no evidence that Leisure had an account there. It is clear that the appellant was involved with a number of individuals in several corporate transactions, but in order to introduce collateral business transactions into evidence they must be

relevant to the instant charge.

Evidence is admissible to show a collateral fact only if that collateral fact tends to prove or disprove a matter of fact which ahs been made an issue in a case. Jones on Evidence, (5th ed.), § 154. The test for relevancy employed in Alabama is that a fact is relevant if there is any logical relationship between that fact and the ultimate inference for which it is offered. Gamble, McElroy's Alabama Evidence, (3d ed.) § 21.01(1). Therefore, the test here would be whether the SAND transactions have any logical relationship with the inference for which such transactions were offered; that is, that the American Bank loan was motivated by a need to cover insufficient checks written in connection with SAND. The State's own evidence shows such motive did not exist and, therefore, the SAND transactions were irrelevant to the charge specified against the appellant in the indictment.

Aside from the general test for relevancy, appellant contends the evidence of issuing a worthless check was evidence of a collateral crime not charged in the

indictment and thus inadmissible.

It is a well established rule in this and other jurisdictions that evidence of other or collateral crimes is not admissible as substantive evidence to establish the guilt of an accused. There are, however, well established exceptions to that rule. Wharton's Criminal Evidence, § 31, lists them as follows:

> "These exceptions fall under the following general divisions: (1) Relevancy as part of res gestae. (2) Relevancy to prove identity of person or of crime. (3) Relevancy to prove scienter, or guilty knowledge. (4) Relevancy to prove intent. (5) Relevancy to show motive. (6) Relevancy to prove malice. (8) Relevancy to rebut special defenses. (9) Relevancy in various particular crimes . . ."

As can be seen, relevancy is the basis for each exception to the general rule enunciated above. That the appellant wrote a worthless check in the SAND transactions has no relevancy: as part of the res restae of the crime charged; to prove her identity; to prove scienter in obtaining the American Bank loan; to show her motive for obtaining that loan, as previously discussed; to show a system of

of obtaining bank loans by use of state deposits, as no such deposits were involved in the SAND dealings; to prove her malice in the crime charged; to rebut special defenses; or to "various particular crimes" in which the instant charge is not included.

The Alabama Supreme Court gave a comprehensive discussion of the rule against use of evidence of prior collateral crimes or misconduct in Hinton v. State, 280 Ala. 48, 189 So. 2d 849 (1966) and in Mason v. State, 259 Ala. 438, 66 So. 2d 557 (1953). Through the cases on this point of law, relevancy is the key factor in determining whether collateral misconduct of a defendant is admissible in evidence.

Evidence which tends to show the commission of a collateral crime or wrongful act not charged in the indictment is inadmissible in order "to prevent conviction based on a jury belief that the accused is a person of bad character. The jury's determination of guilt or innocence should be based on evidence relevant to the crime charged." United States v. Turquitt, 557 F.2d 464, at 468 (5th Cir. 1977).

In Johnson v. State, 38 Ala. App. 82, 76 So. 2d 351 (1954), it was held to be reversible error on a charge of obtaining property by false pretense to admit into evidence, over objection, that the appellant had given the same bank in question a false financial statement previous to the transaction for which he was being tried.

In McMickens v. State, 16 Ala. App. 78, 75 So. 626 (1917), in a prosecution for larceny of scrap brass, which the defendant sold to a scrap yard, it was held to be error to show other sales of wire and brass by the defendant to the same dealer at various times during the year. Likewise, in Gibson v. State, 14 Ala. App. 111, 72 So. 210 (1916), in a prosecution for sale of illegal liquor, it was held to be error to allow a witness to testify to having seen large quantities of whiskey stored in the back room of the defendant's store some time prior to the sale in question. Since the charge was for selling, the evidence of illegal possession, another similar crime, was held to be irrelevant. The Court there stated:

> "... It is the established rule that when irrelevant or improper testimony is admitted on a criminal trial, against the objection of the defendant, it will work a reversal unless it affirmatively appear that the effect was to the benefit of, or not injurious to, the defendant...."

In a much earlier case, the use of evidence of irrelevant but suspicious acts met with the same result. In a prosecution for receving stolen cotton, the Alabama Supreme Court held it to be error to allow testimony that, during the week previous to discovery of the stolen cotton in the defendant's storehouse, persons were seen going into that storehouse just before and about daybreak "with sacks of cotton, anc coming out with the sacks empty. Gassenheimer v. State, 52 Ala. 313 (1975). There the court stated, in pertinent part:

> "... The evidence doubtless alarmed the suspicions of the jury, and inclined them the more readily to believe in the guilt of the defendants, and the less inclined to listen to whatever was offered or said in their defence.... Rumors and suspicions may be born of such facts, and depend on such

> inferences, but not the verdict of a jury which is to stamp dishonor and guilt on the citizen. This must rest on a more substantial basis. The law of the land has a higher logic and humanity than to found its judgments on such facts, and the vague inferences which unreasoning suspicion would draw from them...."

The jury could not infer a connection between Stars Over Alabama and SAND and neither can this court. Inferences cannot be based upon mere speculation. To say the jury could infer that the Stars Over Alabama theme park was to be built at Point Aquarius is the rankest of speculation. Not even a scintilla of evidence supports such a conclusion. In fact, the evidence supports a contrary finding. The record shows Stars Over Alabama, was planned for property in the contiguous counties of Franklin and Marion in northwest Alabama. Point Aquarius is located in Talladega County in east Alabama.

The SAND transactions were irrelevant to the crime charged and should not have been admitted into evidence over proper and timely objections. The prejudicial

effect upon the appellant is obvious.

I therefore respectfully dissent from the conclusions reached by the majority in Parts VII and VIII, supra.

APPENDIX B

CODE OF ETHICS

CHAPTER 25.

CODE OF ETHICS FOR PUBLIC OFFICIALS, EMPLOYEES, ETC.

Sec.

36-25-1. Definitions.

36-25-2. Legislative findings and declarations; purpose of chapter.

36-25-3. State ethics commission - Creation; composition; qualifications, apppointment, terms of office, reappointment and compensation of members; officers; filling of vacancies; annual reports; applicability of chapter, etc., to members, employees, etc.; executive director and staff; waiver of rules and regulations.

36-25-4. Same - Powers and duties generally.

35-25-5. Use of official position or office for personal gain.

36-25-6. Offering, receiving, etc., gifts, favors, etc.

36-25-7. Solicitation or receipt of money for advice or assistance; receipt of fees for services provided by state; disclosure statement.

36-25-8. Use of disclosure of confidential information for private financial gain.

36-25-9. Service on regulatory boards and commissions regulating business with which person associated.

36-25-10. Representation of client or constituent before state agency, department, etc.

36-25-11. Entering into contracts with state agencies.

36-25-12. Promises of future employment, favors, etc., for members of governmental regulatory agencies, boards, etc.

36-25-13. Requirements as to notice of lobbying by former officials or employees before bodies of which such persons were members or employees; entry into contracts with governmental agencies by former officials or employees.

36-25-14. Filing of statements of economic interests.

36-25-15. Statements of economic interests and notice of candidacy of candidates for state office.

36-25-16. Reports by persons related to state officials or employees who represent persons before state agencies or who contract with state.

36-25-17. Reports of violations; cooperation of agency heads; preparation and publication of procedure for review and appeal.

36-25-18. Registration of lobbyists required; filing of supplemental registration.

36-25-19. Monthly reports to be filed by lobbyists, etc., when legislature in session.
36-25-20. Filing of notice of termination of lobbying activities; effect of notice as to requirement for filing of reports.
36-25-21. Reports filed by lobbyists constitue public records; reports open to public inspection.
36-25-22. Provisions of sections 36-25-18 through 36-25-21 not to be construed as affecting certain professional services.
36-25-23. Former members of legislature not to be extended floor privileges for lobbying purposes.
36-25-24. Filing of complaints by citizens generally.
36-25-25. Making false accusation.
36-25-26. Making of false statements, etc. for purpose of influencing legislation.
36-25-27. Penalties for violations of provisions of chapter; prosecution, jurisdiction and venue of actions for violations of chapter, etc.; provisions of chapter not to limit powers of legislature, agencies or commissions to discipline or impeach members, officials or employees nor repeal any provisions of criminal laws.
36-25-28. Constitutional rights of citizens to communicate with members of legislature not to be impaired by this chapter.

36-25-29. Appropriations.

36-25-30. Construction of chapter; repeal of conflicting laws.

Cross references. - As to conflicts of interest of commissioners or employees of municipal housing authorities, see § 24-1-26. As to conflicts of interest of commissioners or employees of county housing authorities, see § 24-1-65. As to prohibition against nepotism in state service, see § 41-1-5.

Collateral references. - 67 C.J.S., Officers, §§116, 133.

63 Am.Jur. 2d, Public Officers & Employees § 313.

§36-25-1. Definitions.

Whenever used in this chapter, the following words and terms shall have the following respective meanings unless the context clearly indicates otherwise:

(1) BUSINESS. Any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity.

(2) BUSINESS WITH WHICH HE IS ASSOCIATED. Any business of which the person or a member of his family is an officer, owner, partner, employee or holder of more than 10 percent of the fair market value of such business.

(3) CANDIDATE FOR PUBLIC OFFICE. Any person who has filed a declaration of candidacy or a petition to appear on the ballot for election as a public official, and any person who has been nominated for appointment to serve as a public official.

(4) COMMISSION. The state ethics commission.

(5) LEGISLATIVE EMPLOYEE. Any person employed by the legislature or by any of its committees and any person employed by a legislator from funds provided by the state, who receives compensation of $23,000.00 or more per year.

(6) LOBBYING. The practice of promoting or opposing the introduction or enactment of legislation before the legislature or the legislative committees or the members thereof, and shall also include the practice of promoting or opposing executive approval of legislation.

(7) LOBBYIST. All persons who seek to

encourage the passage, defeat or modification of any legislation, except members of the Alabama legislature or any person who, on an isolated basis and without the intent to continue beyond a single day during a session of the Alabama legislature, merely appears before a committee or committees of the legislature in his individual capacity, or on behalf of a corporation, partnership, association or other business entity, with which such person is regularly associated as an employee, officer, member or partner without receiving additional salary or compensation other than reasonable and ordinary travel expenses, to express support of or opposition to any legislation, and who shall so declare to a member, members or committee of the legislature with whom he discusses any proposed legislation.

(8) REPORTING YEAR. The reporting official's or employee's fiscal tax year as it applies to his United States income tax return(s).

(9) PUBLIC EMPLOYEE. Any employee of state, county or municipal governments who has administrative and discretionary authority for the receipt or expenditures of public funds or who earns in excess of $25,000.00 annually, but shall not include those persons who are primarily engaged in teaching duties in all schools, colleges, and universities in the state.

(10) PUBLIC EMPLOYEE'S FAMILY. The employee's spouse and dependents.

(11) PUBLIC OFFICIAL. Any elected official at the state, county or municipal level of government and any person appointed under state, county or municipal law to an office where in the conduct

of such office such person has administrative and discretionary authority for the receipt or expenditure of public funds. This term shall also include members of state boards, commissions, committees, councils and authorities, however selected, presidents, vice-presidents, chief purchasing officials and chief financial officials of all schools, colleges and universities of the state; members of city and county industrial boards, planning and zoning boards, school boards, boards of adjustment, utility boards, housing boards public hospital boards and any boards, commissions, committees, authorities or councils having jurisdiction with respect thereto, in all cities whose population is more than 15,000 according to the last decennial census. This term excludes members of all other boards not named including but not limited to those commissions, committees, councils, boards of authorities, functioning solely for cultural or historical purposes and advisory board members and members of board of trustees of institutions of higher learning of the state of Alabama.

(12) PUBLIC OFFICIAL'S FAMILY. The official's spouse and dependents. (Acts 1973, No. 1056, p. 1699, §2; Acts 1975, No. 130, § 1.)

§36-25-2. LEGISLATIVE FINDINGS AND DECLARATIONS: PURPOSE OF CHAPTER.

(a) It is essential to the proper operation of democratic government that public officials be independent and impartial; that governmental decisions and policy be made in the proper channels of the governmental structure; that public office not be used for private gain other than the remuneration provided by law;

and that there be public confidence in the integrity of government. The attainment of one or more of these ends is impaired whenever there exists a conflict between the private interests of an elected official or a government employee and his duties as such. The public interest, therefore, requires that the law protect against such conflicts of interest and establish appropriate ethical standards with respect to the conduct of elected officials and government employees in situations where conflicts exist.

(b) It is also essential to the proper operation of government that those best qualified be encouraged to serve the government. Accordingly, legal safeguards against conflicts of interest must be so designed as not unnecessarily or unreasonably to impede the recruitment and retention by the government of those men and women who are best qualified to serve it. An essential principle underlying the staffing of our government structure is that its elected officials and employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic and other interests, except where conflicts with the responsibility of such elected officials and employees to the public cannot be avoided.

(c) The legislature hereby declares that the operation of responsible democratic government requires that the fullest opportunity to afforded to the people to petition their government for the redress of grievances and to express freely to individual members of the legislature, to committees of the legislature and to officials of the executive branch, their

opinions on legislation, on pending executive actions and on current issues; and that, to preserve and maintain the integrity of the legislative and administrative processes, it is necessary that the identity, expenditures and activities of certain persons who engage in efforts to persuade members of the legislature or the executive branch to take specific actions, either by direct communciation to such officials, or by solicitation of others to engage in such efforts, to be publicly and regularly disclosed. The provisions of this chapter shall be liberally construed to promote complete disclosure of all such information and so as to assure that the public interest will be fully protected.

(d) It is the policy and purpose of this chapter to implement these objectives of protecting the integrity of all governmental units of this state and of facilitating the recruitment and retention of qualified personnel by prescribing essential restrictions against conflicts of interest in state government without creating unnecessary barriers to the public service. (Acts 1973, No. 1056, p. 1699, §1; Acts 1975, No. 130, §1.)

§36-25-3. State ethics commission - Creation; composition; qualifications, appointment, terms of office, reappointment and compensation of members; officers filling of vacancies; annual reports; applicability of chapter, etc., to members employees, etc.; executive director and staff; waiver of rules and regulations.

(a) There is hereby created a state ethics commission which shall be composed of five members, each of whom shall be a

fair, equitable citizen of this state and of high moral character. No member of the commission shall be eligible for appointment to succeed himself. The members of such commission shall be appointed by the following officers: the governor, the lieutenant governor and the speaker of the house of representatives and shall assume their duties upon confirmation by the senate. The members of the first commission shall be appointed for terms of office expiring one, two, three, four and five years, respectively, from September 1, 1975. Successors to the members of this first commission shall each be appointed for terms of five years and until their successors are appointed and have qualified. If at any time there should be a vacancy on the commission, a successor member to serve for the unexpired term applicable to such vacancy shall be appointed by the governor. The commission shall elect one member to serve as chairman of the commission and one member to serve as vice-chairman. The vice-chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in that office. As soon as all the members of the board have been appointed, the governor shall call and provide for the holding of an organizational meeting of the commission.

(b) A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission, and three members thereof shall constitute a quorum.

(c) The commission shall at the close of each fiscal year report to the legislature and the governor concerning the action it has taken, the names, salaries

and duties of all individuals in its employ and the money it has disbursed, and shall make such further reports on the matters within its jurisdiction and such recommendations for further legislation as may appear desirable.

(d) Members of the commission shall, while serving on the business of the commission, be entitled to receive compensation at the rate of $50.00 per day, and each such member shall be paid his travel expenses incurred in the performance of his duties as a member of the commission as other state employees and officials are paid when approved by the chairman thereof.

(e) All members, officers, agents, attorneys and employees of the commission shall be subject to the provisions of this chapter and also to the provisions of law prohibiting political activities by state employees.

(f) The commission shall appoint an executive director and such other staff as is needed. All such appointees shall serve at the pleasure of the commission. All such employees, except for the executive director, shall be employed subject to the provisions of the state merit system law, and their compensation shall be prescribed pursuant to such law. The compensation of the executive director shall be fixed by the commission, but shall not exceed such amount as heretofore or as may hereafter be allowed by law for such officer, payable as the salaries of other state employees. The executive director shall be responsible for the administrative operations of the commission and shall perform such other duties as may be delegated or assigned to him from time to time by regulation or

order of the commission. However, the commission shall not delegate the making of regulations to the executive director. The commission may require the executive director to draft regulations, but no regulation shall be implemented by the executive director until adopted by the commission members.

(g) The commission is hereby authorized when in its discretion the ends of justice will be thereby served, to waive any rule or regulation presented relative to any disclosure statement; provided, that such waiver is done in writing stating the reason why and made a part of the public record. (Acts 1973, No. 1056, p.1699, § 17; Acts 1975, No. 130, §1.)

§36-25-4. Same - Powers and duties generally.

It shall be the duty of the commission:

(1) To prescribe forms for statements required to be filed by this chapter and to furnish such forms to persons required to file such statements.

(2) To prepare and publish a manual setting forth recommended uniform methods of reporting for use by persons required to file statements required by this chapter.

(3) To accept and file any information voluntarily supplied that exceeds the requirements of this chapter.

(4) To develop a filing, coding, and cross-indexing system consonant with the purposes of this chapter.

(5) To make reports and statements filed with it available at reasonable hours to responsible public inquiry subject to such regulations requiring identification by name, occupation, address and telephone number of each such person examin-

ing information on file with the commission; provided, that no copies of reports and statements will be removed from the office of the state ethics commission.

(6) To preserve such reports and statements for a period of six years from date of receipt.

(7) To make investigations with respect to statements filed under the provisions of this chapter, and with respect to alleged failures to file any statement required under the provisions of this chapter and, upon complaint by any individual with respect to alleged violation of any part of this chapter; and, whenever in its opinion a thorough audit of any person or any business should be made in order to determine whether this chapter has been violated, the commission shall direct the examinder of public accounts to have such aduit made and a report thereof filed with the commission. The examinder of public accounts shall upon receipt of such directive immediately comply therewith.

(8) To report suspected violations of law to the appropriate law enforcement authorities.

(9) To issue upon request and publish advisory opinions on the requirements of this chapter, based on a real or hypothetical set of circumstances. The written opinion of the state ethics commission provided to anyone shall protect such person to whom it is directed from liability to either the state, county or municipal subdivision of the state because of any official action or actions performed as directed or advised in such opinion.

(10) To initiate and continue programs for the purpose of educating candidates,

officials, employees and citizens of Alabama on matters of ethics in government service.

(11) To prescribe, publish and enforce rules and regulations to carry out the provisions of this chapter. No such rules and regulations, however, shall be adopted until notice thereof is given by publication at least 30 days prior to the date set for adoption thereof and an opportunity afforded to the public to appear and contest such rules and regulations. The commission is authorized only to make rules and regulations on the subject matter specifically mentioned in this chapter.

(12) After the commission has been organized pursuant to this chapter and has prescribed the rules and regulations and adopted and promulgated such rules and regulations, it shall give notice for 60 days prior thereto of the day on which such rules and regulations shall become effective throughout this state and other provisions of this chapter shall be thereby implemented.

(13) No member nor employees of said commission shall make any public statement or give out any information concerning any complaint against any individual until the investigation of said complaint is completed and the commission has taken final action as to the disposition of said complaint. Any member or employee of said commission who violates the provisions of this section shall be guilty of a misdemeanor and upon conviction be sentenced to the county jail for one year or be fined up to $1,000.00, or both.

(14) In all matters that come before the commission concering a complaint on an individual, the laws of due process

shall be strictly adhered to. (Acts 1973, No. 1056, p.1699, § 10; Acts 1975, No. 130, §1.)

§36-25-5. Use of official position or office for personal gain.

(a) No public official or employee shall use an official position or office to obtain direct personal financial gain for himself, or his family, or any business with which he or a member of his family is associated unless such use and gain are specifically authorized by law.

(b) Unless prohibited by the Alabama Constitution, nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of his legislative duties. (Acts 1973, No. 1056, p. 1699, § 3; Acts 1975, No. 130, § 1.)

Cross reference. -As to prohibition against members of municipal councils voting on questions in which they or their employers have special financial interests, see § 11-43-54.

§36-25-6. Offering, receiving, etc., gifts, favors, etc.

No person shall offer to or give to a public official or employee or his family, and none of the aforenamed shall solicit or receive anything of value, including a gift, favor or service or a promise of future employment, based on any understanding that the vote, official actions, decisions or judgment of the intended recipient or family member would be influenced thereby. Expenses associated with social occasions afforded public

officials and employees shall not be deemed a thing of value within the meaning of this section or prohibited hereby. (Acts 1973, No. 1056, p. 1699, § 4; Acts 1975, No. 130, § 1.)

§36-25-7. Solicitation or receipt of money for advice or assistance; receipt of fees for services provided by state; disclosure statement.

(a) No public official or employee or his family shall solicit or receive any money in addition to that received by the official or employee in his official capacity for advice or assistance on matters concerning the legislature, an executive department or any public regulatory board, commission or other body.

(b) No public official or employee or business with which he is associated shall receive any fee, salary, wages or other compensation for services provided to the state or any of its agencies or to any county, or municipality or instrumentalities thereof unless a disclosure statement provided for in this section shall be filed with the commission by the person rendering the services.

(c) The disclosure statement shall include the following information:

(1) The name of the employer.

(2) The amount of the compensation received for the employment; and

(3) The date of employment. (Acts 1973, No. 1056, p. 1699, § 5; Acts 1975, No. 130, § 1.)

§36-25-8. Use or disclosure of confidential information for private financial gain.

No public official or employee shall use or disclose confidential information

gained in the course of or by reason of his position or employment in any way that could result in financial gain other than his regular salary as such state officer for himself, his family or for any other person. (Acts 1973, No. 1956, p. 1699, § 6, Acts 1975, No. 130, § 1.)

§36-25-9. Service on regulatory boards and commissions regulating business with which person associated.

Unless expressly provided otherwise by law, no person shall serve as a member or employee of a state, county or municipal regulatory board or comission or other body that regulates any business with which he is associated. (Acts 1973, No. 1056, p. 1699, § 7; Acts 1975, No. 130, §1.)

§36-25-10. Representation of client or constituent before state agency, department, etc.

If a public official or employee, or member of his family, or a business with which any of them is associated, shall for a fee represent a client or constituent before any quasi-judicial board or commission, governmental regulatory agency or executive department or agency, notice of such representation must be given within five days after the first day of such appearance to the state ethics commission in the manner prescribed by the commission. No member of the legislature shall for a fee, reward or other compensation represent any person, firm or corporation before the public service commission or the state board of adjustment. (Acts 1973, No. 1056, p. 1699, § 8, Acts 1975, No. 130, § 1.)

§36-25-11. Entering into contracts with state agencies.

Unless exempted under Alabama competitive bid laws or otherwise permitted to do so under law, no public official or employee, or a member of his family, and no business with which any of them is associated shall enter into any contract to provide goods or services which is to be paid in whole or in part out of state, county or municipal funds unless the contract has been awarded through a process of public notice and competitive bidding and a copy of such contract is filed with the commission. All such contract awards shall be made as a result of original bid takings, and no awards from negotiations after bidding shall be allowed. A copy of each contract, regardless of the amount entered into by a public official, employee, family member and any business with which any of them is associated shall be filed with the state ethics commission. (Acts 1973, No. 1056, p. 1699, § 9; Acts 1975, No. 130, § 1.)

Cross reference. - As to interest by aldermen or other municipal officers or employees in contracts with municipalities, see § 11-43-12.

§ 36-25-12. Promises of future employment, favors, etc., for members of governmental regulatory agencies, boards, etc.

No person shall offer or give to a member or employee of a governmental agency, board or commission that regulates a business with which such person is associated, and no member or employee of a governmental regulatory agency, board

or commission shall solicit or accept from any such person anything of value including a promise of future employment or a favor or service while the member or employee is associated with the regulatory agency, board or commission. Expenses associated with social entertainment afforded members and employees shall not be deemed a thing of value within the meaning of this section. (Acts 1973, No. 1056, p. 1699, § 10; Acts 1975, No. 130, § 1.)

Cross references. - As to employment of municipal officers by corporations holding franchises for use of streets, see § 11-43-11. As to members of municipal councils holding offices which have been created or the emoluments of which have been increased during the time for which such members have been elected, see § 11-43-53.

§ 36-25-13. Requirements as to notice of lobbying by former officials or employees before bodies of which such persons were members or employees; entry into contracts with governmental agencies by former officials or employees.

(a) No former state official or employee shall serve for a fee as a lobbyist or represent clients before the body of which he is a former member or employee for a period of three years after he leaves such membership or employment, unless notice of such representation is given within five days after such appearance to the state ethics commission in the manner prescribed by the commission.

(b) No former public official or employee shall enter in a contract with any governmental agencies unless within

five days of entering into said contract notice is filed with the commission of his previous status as a public official or employee and a copy of the contract provided. (Acts 1973, No. 1056, p. 1699, § 11; Acts 1975, No. 130, § 1.)

§36-25-14. Filing of statements of economic interests.

(a) No person elected or employed to serve as a public official or employee shall be allowed to take the oath of office or enter upon his duties unless he has previously filed a statement of economic interests in accordance with the provisions of this chapter at the office of the state ethics commission. Such statement shall be made on a form provided by the commission and shall contain the following information on the person making such filing;

(1) Name, residential address, business; name and address of living spouse, minor and dependent children, adult children, parents, brothers and sisters, and to the best of his knowledge the principal occupation of each of these persons;

(2) A list of occupation(s) to which one third or more of working time was given during previous reporting year by the filing official or employee and spouse;

(3) A listing of total combined family income of the public official or employee during the most recent reporting year as to income from salaries, fees, dividends, profits, commissions and other compensation from any business doing business in Alabama and listing the names of each business and the income derived from such business in the following categorical amounts: less than $1,000.00; at least $1,000.00 and less than $10,000.00;

$10,000.00 or more; further, the person reporting shall name any business or subsidiary thereof in which he or his spouse or dependents, jointly or severally, own one tenth or more of the stock or in which he or his spouse serves as an officer, director, trustee or consultant where such service provides income of more than $1,000.00 for the reporting period;

(4) If the filing public official or employee, or his spouse, has engaged in a business during the last reporting year which provides legal, accounting, medical or health related, real estate, banking, insurance, educations, farming, engineering, architectural management or other professional services or consultations, then the filing party shall report the number of clients of such business in each of the following categories and the income in categorical amounts received during the reporting period from the combined number of clients in each category: electric utilities, gas utilities, telephone utilities, water utilities, cable television companies, intrastate transportation companies, pipeline companies, oil and/or gas exploration companies, oil and gas retail companies, banks, savings and loan associations, loan and/or finance companies, manufacturing firms, mining companies, life insurance companies, casualty insurance companies and other insurance companies, retail companies, beer, win and/or liquor companies or distributors, trade associations, professional associations, governmental associations, associations of public employees or public officials, counties and any other businesses or associations that the commission may deem appropriate. Amounts received from combined clients in each

category shall be reported as: less than $1,000.00; more than $1,000.00 but less than $10,000.00; $10,000.00 or above;

(5) If retainers are in existence or contracted for in any of the above categories of clients, a listing of the categories along with the anticipated income to be expected annually from each category of clients shall be shown in the following amounts: Less than $1,250.00; $1,250.00 or more;

(6) If real estate that is held for investment or is revenue producing is held by a public official, his spouse or dependents, then a listing thereof by the following categories of fair market value: under $50,000.00; at least $50,000.00 but less than $250,000.00; $250,000.00 or more; and the following categories of annual gross rent and lease income on real estate; less than $10,000.00; at least $10,000.00 and less than $50,000.00; $50,000.00 or more. Furthermore, if a public official or a business in which he is associated receives rent or lease income from any governmental agency in Alabama, specific details of the lease or rent agreement shall be filed with the commission;

(7) A listing of indebtedness to businesses operating in Alabama showing types and number of each as follows:banks, savings and loan associations, insurance companies, mortgage firms and stockbrokers (the commission shall add additional categories as it deems necessary); and the indebtedness to combined organizations in each category in amounts as follows: less than $25,000.00; $25,000.00 but less than $50,000.00; $50,000.00 but less than $100,000.00; $100,000.00 or more. Indebtedness associated with the homestead of the person filing is exempted from this

disclosure requirement. Filing required by this section shall reflect information and facts in existence at the end of the reporting year. In the event that said information required herein is not filed as required, the commission shall notify the public official or employee concerned as to his failure to so file and the public official shall have 10 days to file said report after receipt of said notification.

(b) After the original filing of the above prescribed statement(s), each person shall make additional subsequent filing within 90 days after the termination of each succeeding reporting year. Filings required by subdivisions (5), (6) and (7) of subsection (a) of this section shall reflect information and facts in existence at the end of the reporting year. (Acts 1973, No. 1056, p. 1699, § 12; Acts 1975, No. 130, § 1.)

§36-25-15. Statements of economic interests and notice of candidacy of candidates for state office.

(a) Within 10 days after he becomes a candidate for state office, each candidate shall file a statement of economic interests prescribed by the commission and in keeping with this chapter at the office of the state ethics commission.

(b) Each official who receives a declaration of candidacy or petition to appear on the ballot for election as a state official and each official who nominates a person to serve as a state official shall, within five days of such receipt or nomination, notify the state ethics commission of the name of each new candidate for state office, as defined in this chapter, and the date on which such

person became a candidate.

(c) The state ethics commission shall notify such official and, in the case of candidates for appointive office, the clerk or secretary of the body that will approve or disapprove the nomination, of the name of each candidate who files a statement of economic interests at the office of the commission and of the date on which such statement was filed.

(d) Other provisions of the law notwithstanding, if a candidate for elective public office does not submit a statement of economic interests in accordance with the requirements of this chapter within 10 days after he becomes a candidate, his name shall not appear on the ballot. However, the state ethics commission may in its discretion allow the candidate an additional five days to file such statement of economic interests because of mistake, omission, error or other good cause.

(e) If a person who becomes a candidate for appointive public office by nomination fails to file a statement of economic interests in accordance with the provisions of this chapter within 10 days after such nomination, the nomination shall not be approved or ratified until at least 10 days after he has filed such statement of economic interests. (Acts 1973, No. 1056, p. 1699, § 13; Acts 1975, No. 130, § 1.)

§36-25-16. Reports by persons related to state officials or employees who represent persons before state agencies or who contract with state.

(a) When any citizen of the state or business with which he is associated represents for a fee any person before a state regulatory agency or commission or department of the executive branch, he

shall report to the state ethics commission the name of any adult child, parent, spouse, brother or sister who is an official or an employee of that state regulatory agency or commission or department of the executive branch.

(b) When any citizen of the state or business with which he is associated enters into a contract for the sale of goods or services to the state of Alabama or any of its agencies in amounts exceeding $1,000.00, he shall report to the state ethics commission the names of any adult child, parent, spouse, brother or sister, who is an official or employee of the agency or department with whom the contract is made. This section shall not apply to any contract for the sale of goods or services awarded through a process of public notice and competitive bidding.

(c) Each regulatory agency, commission or department of the executive branch or any agency of the state of Alabama shall be responsible for notifying citizens affected by this chapter of the requirements of this provision. (Acts 1973, No. 1956, p. 1699, § 15; Acts 1975, No. 130, § 1.)

§36-25-17. Reports of violations; cooperation of agency heads; preparation and publication of procedure for review and appeal.

(a) Every governmental agency head shall file reports with the commission on any matters that come to his attention which may constitute a violation of this chapter.

(b) Governmental agency heads shall cooperate in every possible manner in connection with any investigation or hearing, public or private, which may be conducted

by the commission.

(c) The commission shall prepare and publish, prior to the implementation of this chapter, procedures for review or appeal of any action taken against or in regard to any person covered in this chapter. (Acts 1973, No. 1056, p. 1699, § 16; Acts 1975, No. 130, § 1.)

§36-25-18. Registration of lobbyists required; filing of supplemental registration.

(a) Every person employed or retained as a lobbyist shall register by filing a form prescribed by the commission within five days after the first undertaking requiring registration.

(b) The registration shall be written, verified and shall contain, but not be limited to, the following information:

(1) The registrant's full name and address;

(2) The registrant's normal business and business address;

(3) The full name and address of the registrant's principal(s);

(4) A listing of the categories of subject matters on which the registrant is to communicate directly with a member of the legislative or executive branch to influence legislation or executive action;

(5) If a registrant's activities are done on behalf of the members of a group other than a corporation, the registration form shall include a categorical disclosure of the number of members of the group as follows: one through five; six through 10; 11 through 25; over 25;

(6) A statement signed by the principal(s) that he has or they have read the registration, know its contents and has

or have authorized the registrant to be a lobbyist in his or their behalf as specified therein and that no compensation will be paid to the registrant contingent upon passage or defeat of such measure(s).

(c) A registrant shall file a supplemental registration indicating any substantial change in the information contained in the prior registration within 10 days after the date of the change. (Acts 1973, No. 1056, p. 1699, § 19; Acts 1975, No. 130, § 1.)

§36-25-19. Monthly reports to be filed by lobbyists, etc., when legislature in session.

Every person registered under section 36-25-18 and every principal employing such lobbyist shall file with the commission a sworn statement concerning the activities set out in said section. The report must be filed between the first and fifteenth day of each month succeeding a month in which the legislature is in session covering the activities during the previous month. The report shall be written, verified and contain, but not be limited to, the following information:

(1) All amounts received or expended directly or indirectly for the purpose of carrying on lobbying activities in the following categories: Less than $1,000.00 $1,000.00 through $3,000.00; more than $3,000.00; but need not include amounts received by such lobbyist for his personal living expenses nor amounts received which are reportable as income to him for federal tax purposes unless his contract of employment provides that amounts received for such expenses or as such income may or shall be used for carrying on

lobbying activities;

(2) A detailed statement of any money loaned or promised to legislators or to anyone on their behalf;

(3) A statement detailing the extent of any direct business association or partnership with any current member of the legislature or public official or employee;

(4) A list of legislation by category supported or opposed by the registrant, by any person retained or employed by the registrant to appear on his behalf, or by any other person appearing on his behalf. (Acts 1973, No. 1056, p. 1699, § 20; Acts 1975, No. 130, § 1.)

§36-25-20. Filing of notice of termination of lobbying activities; effect of notice as to requirement for filing of reports.

(a) A person who ceases to engage in activities requiring him to register under section 36-25-18 shall file a written, verified statement with the commission acknowledging the termination of activities. The notice is effective immediately.

(b) A person who files a notice of termination under this section must file the reports required under sections 36-25-18 and 36-25-19 for any reporting period during which he was registered under this chapter. (Acts 1973, No. 1056, p. 1699, § 21; Acts 1975, No. 130, § 1.)

§36-25-21. Reports filed by lobbyists constitute public records; reports open to public inspection.

All reports filed under sections 36-25-18, 36-25-19 and 36-25-20 are public recorders and shall be made available for

public inspection during regular business hours. (Acts 1973, No. 1056, p. 1699, § 22; Acts 1975, No. 130, § 1.)

§36-25-22. Provisions of sections 36-25-18 through 36-25-21 not to be construed as affecting certain professional services.

The provisions of sections 36-25-18 through 36-25-21 shall not be construed as affecting professional services in drafting bills or in advising clients and in rendering opinions as to the construction and effect of proposed or pending legislation where such professional service is not otherwise connected with legislative action. (Acts 1973, No. 1056, p. 1699, § 24; Acts 1975, No. 130, p. 1.)

§36-25-23. Former members of legislature not to be extended floor privileges for lobbying purposes.

No former member of the house of representatives or the senate of the state of Alabama shall be extended floor privileges of either body in a lobbying capacity. (Acts 1973, NO. 1056, p. 1699, § 28; Acts 1975, No. 130, § 1.)

§36-25-24. Filing of complaints by citizens generally.

Any citizen wishing to file a complaint against any public official or employee covered by this chapter shall initially file said complaint with the commission. If the commission does not take proper action within 45 days, then the said citizen may file the said complaint with the attorney general or other officers

authorized to enforce this chapter. (Acts 1973, No. 1056, p. 1699, § 30; Acts 1975, No. 130, § 1.)

§36-25-25. Making false accusation.

(a) Any person who knowingly and intentionally files a false complaint with the commission, or any member of the commission who initiates action against any state official, state employee or any other person covered by this chapter, knowing such complaint to be false or inaccurate, shall be guilty of the crime of malicious prosecution.

(b) Whoever is convicted in a court of competent jurisdiction of the crime of malicious prosecution, in addition to any other punishment prescribed by law therefor, shall also be required by court order to reimburse the person against whom the false complaint was filed for all of his legal expenses and any other expenses incurred in relation to the accused defending himself against the false complaint. If such complaint is filed within six months prior to an election in which the accused's name appears on the ballot, the person filing the false complaint shall pay to the accused the amount set out above plus an equal amount to the general fund of the state.

(c) If any person, accused of violating this chapter, is acquitted upon trial, then such person may, in the discretion of the court or jury, recover in a civil action from the person who brought the charge against him a sum equal to three times the damages thereby caused. (Acts 1973, No. 1056, p. 1699, § 27; Acts 1975, No. 130, § 1.)

§36-25-26. Making of false statements, etc., for purpose of influencing legislation.

No person, for the purpose of influencing legislation, may

(1) Knowingly or willfully make any false statement or misrepresentation of the facts to a member of the legislative or executive branch; or

(2) Knowing a document to contain a false statement, cause a copy of the document to be received by a member of the legislative or executive branch without notifying such member in writing of the truth. (Acts 1973, No. 1056, p. 1699, § 23; Acts 1975, No. 130, § 1.)

§36-25-27. Penalties for violations of provisions of chapter; prosecution, jurisdiction and venue of actions for violations of chapter, etc.; provisions of chapter not to limit powers of legislature, agencies or commissions to discipline or impeach members, officials or employees nor repeal any provisions of criminal laws.

(a) Any person who violates any provision of this chapter and is found guilty shall be fined not more than $10,000.00 or shall be imprisoned for not more than 10 years or both.

(b) All prosecutions for violations of the provisions of this chapter shall be initiated and prosecuted by the attorney general of the state or by the district attorney having jurisdiction of the offense.

(c) The penalties prescribed in this chapter do not limit the power of either house of the legislature to discipline its

own members or to impeach public officials and do not limit the powers of agencies or commissions to discipline their respective officials or employees.

(d) The circuit court of this state shall have jurisdiction of all cases and actions relative to violations or the enforcement of this chapter, and the venue of any action under this chapter shall be in the country of the residence of the defendant.

(e) Nothing in this chapter is intended to nor is to be construed as repealing in any way the provisions of any of the criminal laws of this state. (Acts 1973, No. 1056, p. 1699, § 26; Acts 1975, No. 130, § 1.)

§36-25-28. Constitutional reights of citizens to communicate with members of legislature not to be impaired by chapter.

Nothing in the provisions of this chapter shall be construed as to deprive any citizen not lobbying for hire of his constitutional right to communicate with members of the legislature. (Acts 1973, No. 1056, p. 1699, § 25; Acts 1975, No. 130, § 1.)

§36-25-29. Appropriations.

The legislature shall appropriate such sums as it deems necessary to implement the provisions of this chapter. (Acts 1973, No. 1056, p. 1699; § 29; Acts 1975, No. 130, § 1.)

§36-25-30. Construction of chapter; repeal of conflicting laws.

This chapter shall be construed in pari materia with other laws dealing with the

subject matter hereof, and repeals all laws and parts of laws in conflict herewith. (Acts 1973, No. 1056, p. 1699, § 32; Acts 1975, No. 130, § 1.)

Supreme Court, U. S.
FILED
JUN 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-2035

MELBA TILL ALLEN,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES A GRADDICK
Attorney General
250 Administrative Building
64 North Union Street
Montgomery, AL 36130

WALTER S. TURNER
Chief Assistant Attorney General
250 Administrative Building
64 North Union Street
Montgomery, AL 36130

JAMES F. HAMPTON
Special Assistant Attorney General
567 South Hull Street
Montgomery, AL 36104

Counsel for Respondent

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Comes now the State of Alabama by and through the Attorney General of Alabama and respectfully asserts that the Petition for Writ of Certiorari is due to be dismissed and that this matter should not be reviewed by this Honorable Court.

STATEMENT OF THE CASE

This case arose from the Circuit Court of Montgomery County, Alabama after the Petitioner was convicted therein for a violation of Act No. 130 of the Alabama Legislature, Regular Session, 1975, hereafter ethics act. (A photocopy of certain pertinent statues including this act are included with the petition and brief of Mrs. Allen) The Petitioner was sentenced to the penitentary for a term of three years.

The appeal of that conviction resulted in an affirmance by the Alabama Court of Criminal Appeals in an opinion issued November 20, 1979. Application for rehearing was

made by the Appellant and was overruled without opinion on December 18, 1979. A Petition for Writ of Certiorari was filed in the Alabama Supreme Court which was denied without opinion, one justice dissenting with opinion, on February 8, 1980.

The Petitioner filed an Application for stay of sentence pending the present petition in this Honorable Court. That stay was granted on February 22, 1980 for ninety days running from February 8, 1980.

The Petitioner then mailed the present petition and brief (according to certificate) on May 5, 1980. However due to some error the State of Alabama received no copy of the present petition and brief until May 22, 1980 after requesting such of Petitioner's counsel.

ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT

1. The decision and rulings by the Alabama Courts concerning the Petitioner's rights to due process in regard to her trial and conviction under the ethics act were in complete accord with the decisions of this Honorable Court. There is no showing that any violation of constitutional rights occurred by the trial and conviction under this act.

The Petitioner's first reason as to why this writ should be granted deals with a question of whether an Alabama Statute was properly applied to Petitioner's case. Further, the Petitioner's "due process" argument consists of allegations of fact in regard to whether the Alabama Ethics Commission was required to give Mrs. Allen a hearing before charges could have been brought. These state law questions were decided by the Alabama Courts and those decisions were in conformity with the decisions of this Honorable Court.

The Petitioner has cited two cases which she contends are in conflict with the Alabama decision in her case. However, a reading of *Vitarelli v. Scaton*, 359 U.S. 535, 3 L. Ed. 2d 1012, 79 S. Ct. 968 (1959) and *Service v. Dulles*, 354 U.S. 363, 1 L. Ed. 2d 1403, 77 S. Ct. 1152 (1957) will reveal that those decisions are so varied from the issues at bar that they don't merit consideration. Obviously they don't show a conflict sufficient (if any at all) to warrant relief.

The Petitioner also cites *Boddie v. Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971) and *Giaccio v. Pennsylvania*, 382 U.S. 399, 15 L. Ed. 2d 447, 86 S. Ct. 518 (1966) in order to define due process. The Respondent has no quarrel with that definition and only adds that those protections were afforded to this Petitioner.

The Petition now before the Court has only alleged that the decision by the Alabama Courts was in conflict with prior decisions of this Court. The Respondent's opposition to that allegation is discussed above. The Respondent would further offer, as follows, other reasons as to why the writ should not be granted.

Initially, the Respondent would submit that the issue now before the Court is one of little significance or importance as far as practical impact on future litigation. Without a doubt this issue is one which turns on its own particular fact situation and is one which few if any other persons will be affected thereby. By the Petitioner's brief itself it can be seen that the first issue raised is based solely upon whether Mrs. Allen was given an adequate hearing under State law. This question is one which can turn only upon those peculiar facts of the case at bar. This ground alone is sufficient reason for this Honorable Court to find that the case at bar is not of importance sufficient to grant the writ.

2. The rulings of the Alabama Courts in regard to questions concerning the Petitioner's effective assistance of counsel and in regard to prosecutorial misconduct are consistent with the decisions of this Honorable Court and with the provisions of the Fifth, Seventh and Fourteenth Amendments to the Constitution.

In regard to the above reason for granting the writ, raised by the Petitioner, the Respondent would note that not one prior decision of this Honorable Court is cited to show that the decision by the Alabama Courts was in conflict with prior decisions of the Honorable Court. So while the Petitioner begins by saying that the decision below is in "conflict with decisions of this Court" she is unable to cite one case that in any way supports that allegation.

The Petitioner has chosen to review her version of the factual events related to this matter and then only to cite one federal case and other Alabama cases which are *consistent* with the decision below. (Petitioner does city *Olmstead v. U.S.*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944, (1928), a case in which the conduct under scrutiny was that of government investigation using wire taps to obtain information and evidence.)

The Respondent fails to see how such argument is in any way sufficient to support a finding that the writ should be granted. On the contrary it is clear that the decision below was correct and obviously consistent with the decisions of this Honorable Court.

There can be no doubt that the decision reached below in regard to the question of whether the Petitioner was afforded effective assistance of counsel was consistent with the principles established in *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) and those

cases that follow. No case of this Court is cited which shows any conflict between this Court's previous opinions and the decisions below.

Similar to the first issue it is clear that the decision below was correct and no allegation is made that the decision was wrong. Likewise this is again an issue which turns on these particular facts and is one which is not likely to affect persons other than the litigants of this appeal.

The Petitioner has asserted two grounds as to why this writ should be granted. The fact remains that the Alabama Courts have previously decided these questions in a manner consistent with the decisions of this Honorable Court. There being no other grounds asserted the writ should be denied.

The Respondent does not now intend in this brief to argue the merits of this issue. The Respondent would point out that the decision in this case by the Alabama Court is not in conflict with the decisions of this Honorable Court. A close examination reveals no conflict in decisions.

It must be said that the petition is due to be denied.

CONCLUSION

Based on the above showing that the holding by the Alabama Courts in this cause is not in conflict with the decisions of this Honorable Court it is respectfully urged that the Petition for Writ of Certiorari is due to be denied.

Respectfully submitted,

CHARLES A. GRADDICK
Attorney General,
State of Alabama

WALTER S. TURNER
Chief Assistant Attorney General

JAMES F. HAMPTON
Special Assistant Attorney General

COUNSEL FOR RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
No.
MELBA TILL ALLEN
Petitioner
v.
STATE OF ALABAMA
Respondent
BRIEF IN OPPOSITION TO
WRIT OF CERTIORARI

AFFIDAVIT OF PROOF OF SERVICE

State of Alabama Montgomery County

I, the undersigned, Assistant Attorney General of Alabama, 64 North Union, Montgomery, Alabama 36130, hereby certify that I have deposited for service three (3) printed copies of a brief in opposition to the Writ of Certiorari to the Honorable Richard D. Horne, 301 St. Joseph Street, P.O. Box 1706, Mobile, Alabama 36601, and forty printed copies to the Clerk of the Supreme Court of the United States.

This the 18th day of June, 1980.

WALTER S. TURNER
Chief Assistant Attorney General
64 N. Union
Montgomery, Alabama

Sworn to and subscribed before me the undersigned, this the 18th day of June, 1980.

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